IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GEORGE A. GRIFFITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-CV-1017-H
	)	
METROPOLITAN TULSA SUBSTANCE ABUSE SERVICES, INC.,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(A)(1)(ii), Plaintiff George Griffith and Defendant Metropolitan Tulsa Substance Abuse Services, Inc., hereby dismiss the above lawsuit with prejudice.

D. E. Dismukes, Esq.
201 W. Fifth Street, Ste. 201
Tulsa, OK 74103

Attorney for Plaintiff, George A. Griffith

DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.

By: Michael C. Redman
Michael C. Redman, OBA No. 13340
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant Metropolitan Tulsa Substance Abuse Services, Inc.

c/J.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

JOHN H. GAMBLING;
ANITA K. GAMBLING;
RAUL SANDOVAL;
BARBARA SANDOVAL;
BUDGET BAIL BONDS;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma;
WILLIAM MACK KELLY
dba Mack Kelly Bail Bonding,

Defendants.

CIVIL ACTION NO. 97-CV-349-K (M)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of August, 1998, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 23, 1998, pursuant to an Order of Sale dated March 16, 1998, of the following described property located in Tulsa County, Oklahoma:

> Lot Sixteen (16), Block Twelve (12) AMENDED PLAT OF VAN ACRES ADDITION A Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendants, John H. Gambling and Anita K. Gambling, through their attorney Janelle H. Steltzlen; Raul Sandoval; Barbara Sandoval; Budget Bail Bonds, through its managing agent Marilyn Stevens; County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney; and William Mack Kelly dba

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Mack Kelly Bail Bonding, by mail. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

Frank H McCarthy
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 20 Day of August, 1997.

L Schwelke

Report and Recommendation of United States Magistrate Judge
Case No. 97-CV-349-K (M) (Gambling)
CDM:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL HASHMI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98 CV 0194 BU (J)**
	)	
DEPARTMENT OF HUMAN SERVICES,	)	ENTERED ON DOCKET
	)	
Defendant.	)	DATE AUG 20 1998

STIPULATION FOR DISMISSAL WITH PREJUICE

Pursuant to F. R. Civ. P. 41 (a)(1), Plaintiff Cheryl Hashmi and Defendant Oklahoma Department of Human Services stipulate that the above-captioned case be dismissed with prejudice to refiling, with each party to bear its own costs and attorney fees.

R. Scott Scroggs, OBA #16889
Nix & Scroggs
601 S. Boulder, Suite 610
Tulsa, Oklahoma 74119
(918) 587-3193; fax (918) 587-3491
COUNSEL FOR PLAINTIFF

Richard A. Resetaritz, OBA #7510
Assistant General Counsel
Department of Human Services
P. O. Box 53025
Oklahoma City, Oklahoma 73152-3025
(405) 521-3638; fax (405) 521-6816
COUNSEL FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDIANA GLASS COMPANY, et al., Plaintiffs,	)	
vs.	)	No. 97-C-665-K
INTERPACK & PARTITIONS, INC., Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 14 day of August, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH JOHNSTON and DIANA RUSS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant.

No. 96-CV-1166K
(Consolidated with
97-CV-740 K)

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated and agreed to by and between the parties herein to dismiss without prejudice the following individuals: Casey Alfred, Marion J. Anderson, Jason W. Bates, Evelyn E. Bowman, Huey L. Bowman, Colin Boyd, Stacy Breger, [redacted], Shelley Burris, Cheryl Chatman, Barbara A. Chiles, Leigh Chisholm, Edward Clark, Alvin Clemons, Eddie Cleveland, Linda Clinton, Norma Cooney, Kimberly Davis, Lemar Davis, Stephanie C. Davis, Kristy K. Dean, Dawn Dockum, Robin L. Dolan, Catina Dorsey, Quinton C. Evans, Kellee Fisher, Katrina Foster, Katrina K. Fox, Charles R. Franklin, Vernon Franklin, Brad Fry, Rebecca Gaines, June E. Givens, Theresa Graham, Trayce Green, Traci Hamilton, Chamesta C. Harris, Glenda S. Haskin, Angela Hayes, Ginger G. Hellyar, Kelley L. Henderson, Walter Hinds, Jennifer Hinson, Susan L. Hobbs, Murva Horbert, Bernard Hubbard, Jeffrey T. Jackson, Kelly Jaggers, Linda R. Johnson, Rhonda Jones, Shelby N. Jones, Amber Kenedy, Angela D. Kessee, Deborah J. Kissell, Deborah A. Lolles, Verlaine D. Lucien, Steve Lynch, Ruby L. McGee, Freddy L. Mewborn, Jr., [redacted], Bobbie J. Myers, Laura Neal, Brandon L. Nichols, Shelly M. Norwood, Marches Owens, Rhonda Patterson,

[redacted], Cheyenne Pratt, Robert D. Pryor, Angela Pyles, Carolyn V. Pyles, Brent A. Rayl, Cogee Rhodes, Mary K. Richesin, Thea Jo Rippy, Ellsworth L. Roach, Jr., Evonne E. Roach, Cheryl J. Roberson, Kerry T. Russell, Lavada Russell, Evelyn V. Sallis, Medley A. Sapp, Benjamin S. Sherwin, Andy L. Simmons, Jr., Robert Smith, Jawanna L. Staley, Anthony D. Steed, Pamela B. Stelly, Barbara M. Miller-Sublett, Carolyn Switzer, Margaret G. Tate, Genetia R. Thomas, Elsie Thompson, Floratine L. Trent, Cheryl N. Vulgamore, and Artice Y. Walker, each party to bear his/her or its own costs with regard thereto.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

STEVEN R. HICKMAN
Attorney for Plaintiffs

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, P.L.L.C. - OBA #36

JO ANNE DEATON (#5938)
100 W. Fifth Street, Suite 400
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Tulsa, Oklahoma 74121-1100
(918) 582-1173 FAX (918) 592-3390

RICHARD GANN
Riggs Abney Neal Turpen Orbison & Lewis
502 W. Sixth
Tulsa, Oklahoma 74119-1010
(918) 587-3161

Attorneys for Defendant Volunteers of America Oklahoma, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of August, 1998, a true and correct copy of the foregoing was mailed with proper postage thereon prepaid to Steven R. Hickman, P.O. Box 799, Tulsa, OK 74101-0799, Patricia Bullock, 320 S. Boston, Suite 718, Tulsa, OK 74103-3783, Mark Jones, 4545 N. Lincoln, Suite 260, Oklahoma City, OK 73105-3498, and Stephen L. Andrew, 125 W. Third, Tulsa, OK 74103.

JoAnne Deaton

wsl:tml
m:\0673\0060\pleading\dismiss

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD J. BLEVINS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 97-CV-23-E (J)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 18th day of August, 1998.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD J. BLEVINS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 97-C-23-E (J)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #7) entered on July 31, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On August 13, 1998, Petitioner filed his timely objection to the Report (#8).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

Petitioner was convicted of Unlawful Possession of Marijuana with the Intent to Distribute and Conspiracy to Commit Unlawful Delivery of Marijuana by a jury in Delaware County District Court, Case Nos. CRF-92-75 and CRF-92-76. He received a sentence of 30 imprisonment for the possession offense and 30 years imprisonment (10 to be served and 20 suspended) for the conspiracy offense, with the sentences to be served consecutively. Petitioner appealed the convictions and on

August 30, 1995, the Oklahoma Court of Criminal Appeals affirmed the convictions and sentences. Petitioner did not seek post-conviction relief.

In the instant habeas corpus action, filed January 8, 1997, Petitioner, appearing *pro se*, presents the same claims of error he raised on direct appeal. Specifically, Petitioner claims that: (1) his Fifth Amendment Constitutional right to protection against Double Jeopardy was violated when he received multiple convictions for the same crime, and (2) the trial court erred in denying Petitioner's demur to the sufficiency of the evidence in violation of his right to due process.

In his Report, the Magistrate Judge thoroughly reviewed the standards imposed on Petitioner's claims by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). He concluded that Petitioner's claims failed to satisfy the standards imposed in 28 U.S.C. § 2254(d), as amended by the AEDPA, and recommended that the petition for writ of habeas corpus be denied. Petitioner objects to the Magistrate Judge's conclusion, arguing that the cases cited in his direct appeal brief are in direct conflict with the state appellate court's conclusion and "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (#8). Petitioner also states that "the possession and conspiracy offenses are in fact one (1) offense and petitioner's separate punishment for those offenses violates the Double Jeopardy clause of the fifth Amendment . . . ." (#8).

DISCUSSION

As discussed in the Report, this Court may not grant habeas corpus relief with respect to a claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d), as amended by the AEDPA. As discussed supra, Petitioner raised the instant claims on direct appeal to the Oklahoma Court of Criminal Appeals. That court considered the record and the relevant law and affirmed the convictions and sentences. In light of Petitioner's objections to the Magistrate Judge's Report and after reviewing the record provided by the parties, including Petitioner's direct appeal brief, the Court concludes that, for the reasons discussed below, Petitioner has not demonstrated that the writ of habeas corpus should issue under the standards of § 2254(d).

A. Petitioner's double jeopardy claim is without merit.

As explained by the Magistrate Judge in his Report, the Oklahoma Court of Criminal Appeals carefully considered Petitioner's double jeopardy claim. That court concluded "it is obvious that these two crimes contain different elements necessary for a conviction. The Possession with Intent to Distribute charge requires possession, whereas the Conspiracy does not. The Conspiracy requires an agreement by two or more persons, whereas the Possession with Intent to Distribute does not . . . This Court is satisfied that there was no violation of the defendant's rights as relates to Double Jeopardy." (#5, Ex. C). In direct contrast to Petitioner's argument as expressed in his objection, that conclusion is entirely consistent with precedent established by the United States Supreme Court. See Ohio v. Johnson, 467 U.S. 493, 497-98 (1984); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); Blockburger v. United States, 284 U.S. 299, 304 (1932).

The Court finds that the state court's ruling on this issue is not contrary to, or does not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d). Therefore, the Magistrate Judge's Report should be adopted and affirmed and Petitioner's application for writ of habeas corpus should be denied as to the Double Jeopardy issue.

B. Petitioner's claim of insufficient evidence fails to satisfy the § 2254(d) standard.

Petitioner's challenge to the sufficiency of the evidence used to convict him also fails to satisfy the § 2254(d) standard. As stated by the Magistrate Judge, the Supreme Court has held that a federal court may grant habeas relief on insufficiency of the evidence claims only if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of the necessary elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319-326 (1979); see also United States v. Woodley, 136 F.3d 1399, 1405 (10th Cir. 1998) (indicating that the Jackson standard is the standard to be applied to insufficiency of the evidence claims). Under § 2254(d)(1), as amended by the AEDPA, this Court must now determine whether the state court applied the Jackson standard and provided "fair process and engaged in reasoned, good-faith decisionmaking when applying Jackson's 'no rational trier of fact' test." Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir. 1997).

After carefully reviewing the record, the Court agrees with the Magistrate Judge's conclusion that the Oklahoma Court of Criminal Appeals' ruling on Petitioner's insufficient evidence claim is neither contrary to nor an unreasonable application of the Jackson standard. The state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying Jackson's "no rational trier of fact" test. As a result, this Court may not grant habeas corpus relief on that claim.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#7) is **adopted and affirmed.**

2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 18th day of August, 1998.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE SPALDING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97-CV-836-B
	)	
HILTI, INC.,	)	
Defendant.	)	

JUDGMENT

This action came on for hearing before the Court, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered granting summary judgment to Defendant, Hilti, Inc.,

IT IS ORDERED AND ADJUDGED that Plaintiff, Steve Spalding, take nothing from the Defendant Hilti, Inc., that the action be dismissed on the merits, and that each party shall bear their own attorney fees and costs.

DATED at Tulsa, Oklahoma this 18th day of August, 1998.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREDDIE,; SCOTT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 98-CV-94-B (J)**
	)	
KENNETH SAWYER, et al.,	)	
	)	
Defendants.	)	

ORDER

On this 5th day of August, 1998, Defendants', Larry Postelwaite, Robert Coleman, and Earl Wilson, Motion to Dismiss is before the Court, the Plaintiff, having received notice of this hearing, has contacted the Clerk of this Court and voluntarily waived his appearance, and the Defendants appear through counsel of record, David E. O'Meilia, and the Court, having examined Defendants' motion and brief in support, finds that this Court's previous Order entered May 19, 1998, finding lack of jurisdiction over the subject matter herein, is equally applicable to the individuals Defendants.

THEREFORE, IT IS ORDERED that this action against Defendants, Larry Postelwaite, Robert Coleman, and Earl Wilson, is hereby dismissed with prejudice due to lack of subject matter jurisdiction.

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DATED this 18 day of Aug, 1998.

THOMAS R. BRETT
Senior United States District Judge

David E. O'Meilia, Esq.
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

G:\3170\050\DOC\Order dismissing individual defendants.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREDDIE,; SCOTT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 98-CV-94-B (J)**
	)	
KENNETH SAWYER, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

On this 5th day of August, 1998, Defendants, The Crosby Group, Inc. and its McKissick Products Division, having filed their Application for Attorney Fees and Affidavit of David E. O'Meilia as previously ordered by this Court, and the Plaintiff, having been duly notified of this hearing, has contacted the Clerk of this Court and voluntarily waived his appearance and elected to stand on his written Objection to Attorney Fees filed June 17, 1998, and Defendants, present through their counsel of record, David E. O'Meilia, the Court heard evidence from an expert witness, examined Defendants' Application and the billing statements attached thereto, and finds that Defendants' Application for Attorney Fees should be and is hereby granted in the amount of Seven Thousand Six Hundred Four and 25/100 Dollars ($7,604.25), and Two Hundred Thirty-four and 88/100 Dollars ($234.88) for computer research, totaling Seven Thousand Eight Hundred Thirty-nine and 13/100 Dollars ($7,839.13).

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants recover from Plaintiff the attorney fees incurred in the amount of Seven Thousand Eight Hundred

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Thirty-nine and 13/100 Dollars ($7,839.13), with interest thereon at the rate of 5.407% as provided by law until such amount is paid in full.

DATED this 18th day of Aug, 1998.

THOMAS R. BRETT
Senior United States District Judge

David E. O'Meilia, Esq.
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

G:\3170\050\DOC\Judgment.wpd

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LAUREL MARKEL, an individual,

Plaintiff,

v.

OKEY RUSSELL NELSON, an individual; MADISON EXPRESS, INC.; an Indiana Corporation; and NORTHLAND INSURANCE COMPANY, a Minnesota Corporation,

Defendants.

Case No. 97-CV-1057-BU

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Plaintiff and the Defendants, stipulate that the Plaintiff does hereby dismiss all claims in this matter, based on a settlement between the parties, with prejudice to filing of a further action thereon.

Respectfully submitted,

MARLIN DAVIS
Attorneys for Plaintiff

OF COUNSEL:

HERROLD, HERROLD, SUTTON
& DAVIS, P.A.
600 Kensington Tower
2250 East 73rd Street
Tulsa, OK 74136
918/491-9559
918/491-7337 (Fax)

- and -

VICTOR F. ALBERT
KRIS T. LEDFORD
Attorneys for Defendants

OF COUNSEL:

McKINNEY & STRINGER, P.C.
101 North Broadway
Oklahoma City, Oklahoma 73102
405/239-6444
Fax No. 405/239-7902

VFA/bpl/4140-208/316183

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 18 1998

AUG 18 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES FRANK,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-122-M

ENTERED ON DOCKET
DATE AUG 19 1998

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 17th day of AUG, 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(10)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES FRANK,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of
Social Security,

Defendant.

ENTERED ON DOCKET
DATE AUG 19 1998

CIVIL ACTION NO. 98-CV-122-M

FILED
AUG 18 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for additional proceedings pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

DATED this 17th day of AUG. 1998.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

(9)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROY A. SMITH,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

NO. 96-CV-481-M

ORDER

This case is hereby reversed and remanded in accordance with the 10th Circuit Court of Appeals' ORDER AND JUDGMENT dated June 8, 1998 and filed in this Court on August 3, 1998.

SO ORDERED this 18th day of August, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(19)

IN THE UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LANCE HENDRICKS,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY, INC.

Defendant.

Case No. 98-CV-0197-H (J)

ORDER OF DISMISSAL WITH PREJUDICE

On this 14TH day of August, 1998, the Joint Motion of the Parties for an Order of Dismissal with Prejudice came on before the Court for hearing. The Court finds that the parties have agreed to dismiss the plaintiff's claims with prejudice and the defendant's counter-claim with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff's claims are dismissed with prejudice to refiling and the defendant's counter-claim is dismissed with prejudice to refiling.

UNITED STATES DISTRICT JUDGE FOR
THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:

KEVIN KELLEY - OBA # 11889
Attorney for the Plaintiff

DENNIS KING - OBA # 5026
Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD A. DREHER, SR.,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

ENTERED ON DOCKET
DATE AUG 18 1998

Case No. 97-CV-502-H (J)

FILED
AUG 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 14TH day of August, 1998.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98CV0276H(M)**
	)	
SIDNEY PETE,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 14th day of August, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Sidney Pete, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Sidney Pete, was served with Summons and Complaint on June 19, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Sidney Pete, for the principal amount of $2,681.79, plus accrued interest of $2,058.16, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the

current legal rate of 5.438 percent per annum until paid, plus costs of this action.

S/ SVEN ERIK HOLMES

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEAN F. TRIGALET and MYRA J. TRIGALET, Personal Representatives of the Estate of CONSTANCE TRIGALET,

Plaintiffs,

v.

CITY OF TULSA, OKLAHOMA,

Defendant.

Case No. 92-C-368-H

ORDER

This matter comes before the Court on a renewed motion for summary judgment by Defendant City of Tulsa (Docket # 122). In an order dated August 26, 1997, the Court denied Defendant's motion for summary judgment, but stayed the matter pending a decision by the United States Supreme Court in Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1997), cert. granted, 117 S. Ct. 2406 (U.S. June 2, 1997) (No. 96-1337). The Court also stated that after a decision in Lewis, additional dispositive motions could be filed. The Supreme Court decided County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998), on May 26, 1998. Defendant now renews its motion for summary judgment on Plaintiffs' claims arising under 42 U.S.C. § 1983.

I

As in the previous motion for summary judgment, for purposes of this motion, the Court accepts as true the following material facts alleged by Plaintiffs:

1. On Saturday, May 6, 1990, at approximately 12:09 a.m., Constance Trigalet, Martha Annette Trigalet, and Steven Munson were lawfully traveling southbound on Peoria Avenue in Tulsa when a GMC Safari Minivan struck their Ford Escort station wagon. The minivan, which ran a red light while traveling west on 3rd Street, and was being pursued by members of the Tulsa Police Department (hereinafter "TPD"). The Trigalets and Munson died as a result of injuries sustained in the collision.

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2. The police pursuit began near midnight on May 6. Officers Warrick and Ashby (known to the TPD as David 382 and David 101, respectively) observed two vans stopped on westbound 13th Street. The drivers of the vans were not violating any traffic laws when the officers observed them.

3. After observing the vans on 13th Street, Officers Warrick and Ashby decided to investigate the vans because they thought the drivers of the vehicles were acting suspicious, and thus that the vehicles might be stolen.

4. The exact time at which the officers first observed the two vans is unknown. The first radio transmission in reference to these vans occurred at 12:04:59, May 6, 1990, when Officer Warrick said "81 to 01, They're still west on 13th". The first radio transmission was recorded when both officers got into their cars and Officer Warrick pulled behind the vans on 13th Street.

5. Officers Ashby and Warrick followed the vans from Winston and 13th Street, until Officer Greg Smith (known to the TPD as David 384) confirmed that the GMC minivan was stolen. The officers then activated their emergency lights , and Officer Ashby pulled one of the vans over. The GMC minivan driver increased his speed, and Officer Warrick began a high-speed pursuit of the van.

6. The sole reason for the pursuit was for a stolen vehicle offense. There was no information that the suspects in the fleeing van had committed any violent felony or were known for violent behavior. Most stolen vehicles are recovered without the necessity of a pursuit.

7. The passengers in the van pulled over by Officer Ashby were juveniles who were associated with or related to the driver of the van that fled. Officer Ashby questioned the occupants of the stopped van concerning the identity of the people in the fleeing van. The occupants of the stopped van answered questions regarding the identity of the driver of the fleeing van.

8. Officer Warrick pursued the GMC minivan on the following path: west on 13th Street to Louisville, then north on Louisville to 5th Place, then west on 5th Place to Jamestown, then north on Jamestown to 3rd Street, then west on 3rd Street to Indianapolis, then north on Indianapolis to 2nd Street, then west on 2nd Street to approximately 2nd and Gary, where Officer Warrick lost sign of the minivan. Officer Warrick never terminated his pursuit, but continued the pursuit even down 3rd Street when officers were involved in the pursuit.

9. The minivan ran at least eight stop signs as Officer Warrick pursued it through residential areas of central Tulsa. During the pursuit the minivan passed a high school and a park, and came within blocks of the University of Tulsa. This portion of the pursuit involved speeds in excess of 60-65 mph, with the fleeing van traveling through stop signs at major intersections between forty and fifty mile per hour without slowing. During Officer Warrick's pursuit of the vehicle, he broadcast information concerning the pursuit continuously, including the fact that the suspect was "busting" through major intersections.

10. Officer Warrick lost sight of the van in the vicinity of 2nd Street and Gary. Officer Harry Stege renewed the pursuit shortly thereafter when he observed the minivan driving through the intersection of 2nd Street and Delaware.

11. Officer Stege knew of the pursuit because an eastside division officer announced on his radio subfleet that eastside division had been in pursuit of a blue van for several minutes. Using the information he received from the radio transmission, Officer Stege was able to close in on the van. Officer Stege saw the van turn south on Delaware from 2nd Street and pursued it from there.

12. The minivan then turned west on 3rd Street, never decreasing speed for the turn, and accelerated from there. The 3rd Street portion of the pursuit reached speeds up to 80 mph. Officer Stege pursued the minivan west on 3rd Street through Lewis Avenue, a main north-south

thoroughfare in Tulsa, at a speed in excess of 70 mph. Officer Stege continued the pursuit through Utica Avenue, another main north-south thoroughfare, at a speed approaching 80 mph.

13. During Stege's pursuit of the fleeing suspect, he noted that the driver of the vehicle was operating the minivan "without any regard to the safety of life or property." Despite this fact, Officer Stege never considered discontinuing the pursuit.

14. When Officer Don Pierce heard on his police radio that the pursuit was approaching his location, he activated his emergency lights and set up at 3rd Street and Utica to join in hen pursuit. He then joined the pursuit at 3rd Street and Utica Avenue.

15. The pursuit ended at 3rd Street and Peoria Avenue at 12:09:37 a.m., when the minivan collided with the Plaintiffs' decedent's vehicle.

16. Prior to the pursuit, a helicopter was en route to the pursuit scene. Mr. Clifford Magee saw the suspect vehicle pass by his home without its lights on with a police vehicle a few car lengths behind it. Within a couple of seconds of the suspect and police vehicle passing his home, Mr. Magee observed another TPD vehicle pass his home at a high rate of speed. In addition, immediately after the pursuit, Mr. Magee observed a helicopter passing his home near where the pursuit ended.

17. In addition to numerous through streets, the pursuit crossed five main thoroughfares at high speeds - 11th Street on Louisville, Harvard on 2nd Street, Delaware on 3rd Street, Lewis on 3rd Street, Utica on 3rd Street, and finally Peoria on 3rd Street.

18. Officer Warrick knew that traffic could be expected on the pursuit route at any time, and he knew that there was the possibility of severe injury or death to a motorist that might be traveling along a street during this pursuit. Officer Warrick knew that the suspect was driving without due regard for life as he drove through each stop sign. However, at each stop sign, Officer Warrick made the conscious decision to continue the pursuit.

19. Officer Stege knew that traffic could be expected on Lewis, Utica, and Peoria Avenues at anytime, and he knew that a collision at this pursuit's speed could cause severe injury or death. Officer Stege described the minivan as being driven "without any regard for the safety of life or property." As Officer Stege approached 3rd Street and Peoria, he knew that the minivan would hit anyone traveling north or south on Peoria because it could not make the green light. However, Officer Stege did not consider abandoning the pursuit. At his deposition Officer Stege stated that "[i]nterrupting the pursuit didn't enter [his] mind."

20. Officer Pierce knew that people are likely to travel on Tulsa streets going to and from recreation and entertainment on a Saturday night at midnight. Officer Pierce also knew that Utica and Peoria are arterial north-south streets in Tulsa, and that traffic could be expected along those streets at any time of the day or night.

22. Moments before the collision and before Officer Pierce had joined in the pursuit, two police vehicles were observed pursuing the minivan down 3rd Street across Wheeling Avenue. The first police vehicle was one or two car lengths behind the minivan and the other police vehicle, which Plaintiffs contend was Officer Warrick, who had rejoined pursuit on 3rd Street, was seconds behind the first police vehicle.

23. No supervisor or watch commander was notified of this pursuit, nor did any supervisor or watch commander supervise this pursuit.

24. The posted speed limit for east 3rd Street between Delaware and Peoria Avenues was on May 6, 1990, and still is, 30 mph. The speed limit was unposted on all other portions of the pursuit path taken May 6, 1990. The unposted residential Tulsa speed limit is 25 mph.

26. The TPD's written vehicle pursuit policy in force May 6, 1990, required that all pursuits be supervised, and directed officers to terminate such pursuits when the hazards outweigh the benefits.

29. David Been, who was training director for the TPD at the time of the accident, testified that prior to May 6, 1990, officers received the following training on high-speed pursuits: (1) 24 hours of hands-on training regarding the mechanical operation of a vehicle; and (2) some additional amount of training on the philosophy of pursuits, the specifics of which he did not recall.

30. O. L. Harris, who was safety and equipment manager for the TPD at the time of the accident, testified that it was appropriate to chase any traffic offender no matter what the offense. Officers are trained to use due caution and common sense in evaluating pursuits. Due to the discretionary nature of the pursuit policy, unless a supervisor discontinues a chase, the decision to terminate a chase is solely up to the officer.

31. From 1985 through 1990, seven officers were disciplined for pursuit policy violations. All of the violations dealt with technical violations of the pursuit policy and not the decision to initiate, continue, or terminate a pursuit.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)

("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

Plaintiffs assert that Defendant violated their constitutional rights to substantive due process under the Fourteenth Amendment, and therefore their claims are cognizable under § 1983. Specifically, Plaintiffs assert that (1) the actions of the police officers in this case violated Plaintiffs' constitutional rights and that Defendant is legally responsible for such violations, and

(2) the policies and practices of Defendant violated Plaintiffs' constitutional rights.

A

In Lewis, the Supreme Court addressed the standard for a substantive due process violation as a result of a high-speed police chase. The Supreme Court held that in such a case "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." Id. at 1711-12. Since Lewis, the Tenth Circuit also has addressed liability for a due process violation based upon police conduct and explored the reasoning behind the Lewis opinion. Radecki v. Barela, No. 96-2297, 1998 WL 334490 (10th Cir. June 24, 1998).

In Radecki, the Tenth Circuit noted that the Lewis standard built upon the principles previously articulated in Tenth Circuit opinions. These principles include the need for restraining the scope of substantive due process claims, the policy that § 1983 actions should not displace state tort law, and the necessity for deference to local bodies in public safety decisions. Radecki, 1998 WL 334490, at * 3, * 5. These principles, the Supreme Court stated, support the conclusion that substantive due process can only be violated when governmental conduct "shocks the conscience." Lewis, 118 S. Ct. at 1717.

Lewis also recognized that there exists a spectrum of governmental conduct upon which a due process violation could occur. The Supreme Court reiterated that, at one end of the spectrum, liability for negligent acts of state officials does not sustain a due process violation. Id. at 1718. At the "other end of the culpability spectrum" is "conduct intended to injure in some way unjustifiable by any government interest." Id. This type of conduct, the Supreme Court observed, is most likely to shock the conscience and result in a due process violation. In the middle range of culpability is conduct that is more than negligent but less than intentional conduct. Id. "Within this middle range, Lewis directs us to analyze the level of culpability by

examining the circumstances that surround the conduct at issue and the governmental interest at stake." Radecki, 1998 WL 334490, at * 5.

In this middle range of conduct, the Supreme Court focused on the government official's opportunity for deliberation. For example, in a custodial prison situation, officials can and are required to attend to the needs of an inmate. In this sense, actual deliberation by officials is practical and is in fact employed. Thus, "deliberate indifference" in the prison custodial context may well rise to a constitutionally shocking level. Lewis, 118 S. Ct. at 1719. The Court contrasted the custodial situation, however, with an official response to a prison riot or other violent disturbance. In this situation, "a much higher standard of fault than deliberate indifference" must be shown to sustain liability. Id. at 1720.

Lewis specifically compared the level of culpability required for officials in a prison riot to the level of culpability needed in a high-speed police chase. In both the prison riot and police chase situations, officials must "act decisively" and "show restraint" at the same time, id., while acting "'in haste, under pressure, and frequently without the luxury of a second chance.'" Id. (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). As the Tenth Circuit has stated, "[b]oth situations require the officer's instant judgment, and accordingly, no substantive due process claim can lie unless the defendant official's conduct was unjustified by any government interest and was 'tainted by an improper or malicious motive.'" Radecki, 1998 WL 334490, at *6 (quoting Lewis, 118 S. Ct. at 1721). Thus, the legal standard applicable in this case can be summarized as follows:

> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

Radecki, 1998 WL 334490, at * 6.

Plaintiffs first argue that the holding of Lewis is inapplicable to the instant case since Plaintiffs were innocent bystanders who were injured. Plaintiffs contend that Lewis applies only when the person injured is a suspect fleeing from police. In Lewis, Brian Willard, who was driving a motorcycle, fled after being approached by police. Lewis, 118 S. Ct. at 1712. Willard's passenger on the motorcycle was Phillip Lewis, who was killed in the high-speed chase that ensued. Id.

The Court rejects Plaintiffs' argument that Lewis is limited to situations when individuals fleeing from police are injured. Nothing in the language of the opinion supports such a limitation and the Court's discussion clearly does not draw that distinction. See id. at 1720 n.13 (citing an instance in which a citizen suffered injury from police action). Moreover, in Radecki, the individual injured was a citizen who assisted a police officer after hearing screams. Radecki, 1998 WL 334490, at * 1. Accordingly, the Court finds that the standard enunciated in Lewis controls the current situation.

In the instant case, as in Lewis and Radecki, the officers were acting in an emergency situation without the opportunity for deliberation or considered thought. At the hearing, counsel for Plaintiffs conceded that the officers did not have an intention to injure Plaintiffs and that the record is devoid of any such intentional conduct. There is also no indication that the officers' actions were not justified by an improper government interest. Thus, considering the emergency nature of the situation, the lack of intent to harm on part of the officers, and the great deference given to law enforcement in these situations, the Court finds that the officers did not violate the substantive due process rights of the Plaintiffs. Accordingly, Defendant's motion for summary judgment on this basis is hereby granted.

B

Plaintiffs next claim that even if the individual officers did not violate Plaintiffs' substantive due process rights, the City of Tulsa is liable for Plaintiffs' injuries as a result of its

own policies and practices. Plaintiffs cite Williams v. City and County of Denver, 99 F.3d 1009 (10th Cir. 1996) for this proposition. Specifically, Plaintiffs allege that the Tulsa Police Department violated their constitutional rights in five areas: (1) failure to maintain adequate records of pursuits; (2) failure to adopt a pursuit policy with clear guidelines; (3) failure to properly train officers regarding pursuits; (4) failure to properly supervise and monitor officers regarding pursuits; and (5) failure to properly discipline officers regarding pursuits. In contrast, Defendant argues that a municipality may not be held liable if there is no underlying constitutional violation by its employees.

In Williams, the Tenth Circuit noted that there are two categories of cases in which a municipality may be liable under § 1983. First, a municipality may be liable for "failing to train an employee who as a result acts unconstitutionally." Id. at 1019. In this category, the unconstitutional acts are committed by individual officers. The municipal policy, although it may be constitutional, must be the "moving force" behind the employee's unconstitutional conduct, id., and must demonstrate deliberate indifference to the rights of the public. Id. at 1020. In this category, the city "may not be held liable where there was no underlying constitutional violation by any of its officers." Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993) (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam)).

Second, a municipality may be liable "not derivatively on the basis of unconstitutional conduct by an individual officer, but directly on the basis of the unconstitutional nature of the city's policy itself." Williams, 99 F.3d at 1019. If the city's actions "can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense," id. at 1020 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)) then a city may be liable even if there are no unconstitutional acts by an individual officer. Id.

As noted above, since the Court finds that there has been no underlying constitutional violation by the officers in the instant case, there can be no municipal liability under the first

category of indirect liability. See Hinton, 997 F.2d at 782; Heller, 475 U.S. at 799. Accordingly, Defendant's motion for summary judgment on this basis was granted.

As to the second category of municipal liability, Defendant correctly notes that the Williams opinion has been vacated by the en banc Tenth Circuit and remanded to the district court in light of the Supreme Court opinions in Lewis and Board of County Comm'rs v. Brown, 117 S. Ct. 1382 (1997). See Williams v. City and County of Denver, No. 94-1190, 1998 WL 380518, at * 1 (10th Cir. June 26, 1998) (unpublished). Since Williams, however, the Supreme Court has made a distinction between a situation in which a municipal policy that itself is unconstitutional and a situation in which a municipality has not inflicted injury directly through its own actions. Brown, 117 S. Ct. at 1388-89. In the first situation, "when an official municipal policy itself violates federal law, issues of culpability and causation are straightforward; simply proving the existence of the unlawful policy puts an end to the question." Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing Brown, 117 S. Ct. at 1388-89). However, when a city's policy is lawful on its face "and the municipality therefore has not directly inflicted the injury through its own actions," culpability and causation are more difficult in terms of proof. Id.

Thus, even though the opinion in Williams has been vacated, its distinction between direct and indirect municipal liability is still valid and persuasive. The Court previously ruled that there were disputed issues of fact as to whether the policies and practices of the TPD, by themselves, violated Plaintiffs' constitutional rights. The Court finds nothing in Lewis or in the vacating of the Williams opinion that alters the analysis or conclusion in that ruling. Accordingly, Defendant's renewed motion for summary judgment on this basis is hereby denied.

IV

For the reasons set forth above, Defendant's motion for summary judgment (Docket # 122) is hereby granted in part and denied in part. The scheduling order in this case is also hereby stricken.

As directed at the hearing, within one month from the file date of this order, the parties are to prepare a request for interlocutory appeal. The request for interlocutory appeal should address the Court's second conclusion in this order denying summary judgment on the basis of unconstitutional policies by Defendant, relying upon the Tenth Circuit's analysis in Williams. The request for interlocutory appeal will be granted if, and only if, Defendant places on file in this case a statement from Magistrate Judge Joyner indicating that Defendant is satisfactorily complying with his discovery order, dated May 8, 1997.

IT IS SO ORDERED.

This 14th day of August, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY L. MATTHEWS,

Plaintiff,

v.

BROKEN ARROW MEDICAL CENTER, INC., an Oklahoma profit corporation,

Defendant.

Case No. 97-CV-396H(E)

ORDER

This matter comes on before the undersigned Judge of the District Court upon Plaintiff's Unopposed Motion for Dismiss of Complaint and Counterclaim. The Court, finding good cause exists, grants the Motion.

IT IS THEREFORE ORDERED that Plaintiff's Complaint and Defendant's Counterclaim are hereby dismissed with prejudice.

JUDGE OF THE DISTRICT COURT

Submitted by,
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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STEPHANIE RENE MARTIN, KENNETH WAYNE MARTIN, II, individually and as next of friends of KELLY KATHERINE MARTIN, a minor,

Plaintiffs,

v.

UNIVERSITY CHEVROLET-GEO, INC., an Oklahoma corporation; LUCKY MOTOR, INC., a Texas corporation; and JAY SCOTT JACKSON,

Defendants.

Case No. 97-CV-800-H

ORDER

This matter comes before the Court on Plaintiffs' motion for default judgment against Defendant Jay Scott Jackson.

Plaintiffs request that default be entered against Mr. Jackson on the grounds that he allegedly has not answered or responded to the complaint since being served on February 28, 1998. Federal Rule of Civil Procedure 4(e)(2) states that service may be made at an "individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

In the instant case, the process server's affidavit states that papers were served on Mr. Jackson through his sister, Carrie Donovan, at Mr. Jackson's residence. The affidavit does not allege that Ms. Donovan resides at Mr. Jackson's residence. There also is no other evidence to indicate that Ms. Donovan was "residing" at Mr. Jackson's house. Accordingly, service was improper under Rule 4(e)(2).

The Court next addresses whether Plaintiffs are warranted an extension to complete service against Mr. Jackson. Rule 4(m) of the Federal Rules of Civil Procedure, which governs extensions for service, states in pertinent part as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice of the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiffs have shown good cause for the failure to timely effect service. If so, the Court must give Plaintiffs a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if Plaintiffs fail to show good cause, the Court "must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service." Id.

The legislative history of Rule 4(m) does not define "good cause" and cites a defendant's evasion of service as the sole example of good cause. Cox v. Sandia Corp., 941 F.2d 1124, 1125 (10th Cir. 1991). The "good cause" provision "should be read narrowly to protect only those plaintiffs who have been meticulous in their efforts to comply with the Rule." Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1438 (10th Cir. 1994). The Tenth Circuit has enunciated several instances in which good cause was not present. For example, a defendant's actual notice of the suit is not good cause. Despain, 13 F.3d at 1439. Moreover, the absence of prejudice to defendants, by itself, is not good cause for failure to serve. Id. Inadvertence or negligence alone do not constitute good cause, while mistake of counsel or ignorance of the rules

also do not suffice. Kirkland v. Kirkland, 86 F.3d 172, 176 (10th Cir. 1996). Even the running of the statute of limitations does not demonstrate good cause and make dismissal inappropriate. Despain, 13 F.3d at 1349. See also Putnam v. Morris, 833 F.2d 903, 905 (10th Cir. 1987) (holding that since it is "counsel's responsibility to monitor the activity of the process server and to take reasonable steps to assure that a defendant is timely served," reliance on a process server who fails to perform is not good cause).

Upon application of these principles, the Court concludes that Plaintiffs have not shown good cause for failure to timely effect service upon Mr. Jackson since Plaintiffs' mistaken belief that service was effective is not good cause.[1] Since Plaintiffs have not met the "good cause" standard, an extension of time for service is not mandatory. Instead, the Court "must still consider whether a permissive extension of time may be warranted." Espinoza, 52 F.3d at 841. This complaint was filed on September 28, 1997 and there has been no action against Mr. Jackson other than the one plainly deficient attempt at service. Accordingly, the Court finds that there are not grounds for a permissive extension of time.

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[1] As one commentator has stated, "[t]he lesson to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days with the respect reserved for a time bomb." Cox, 941 F.2d at 1126.

Accordingly, Plaintiffs' motion for default judgment against Defendant Jackson is hereby denied. This action against Mr. Jackson is hereby dismissed without prejudice for failure to timely effect service.

IT IS SO ORDERED.

This 14th day of August, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIMMY GENE KELLY,

Defendant.

No. 91-CR-72-B
97-CV-748-B

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant.

SO ORDERED THIS 17th day of Aug, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 91-CR-72-B
	)	97-CV-748-B
JIMMY GENE KELLY,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Defendant Jimmy Gene Kelly's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #68). The Plaintiff United States of America has filed its response brief (#70). After careful review of the motion papers and the record, the Court concludes that Defendant's motion pursuant to § 2255 is time-barred and should be dismissed.

BACKGROUND

On December 19, 1991, Defendant was convicted by a jury of second-degree murder, in violation of 18 U.S.C. § 1111. (#49). At sentencing, the Court found grounds to depart upwardly eight levels from the range specified in the United States Sentencing Guidelines ("U.S.S.G." or "sentencing guidelines") and sentenced Defendant to 360 months imprisonment to be followed by five years of supervised release. Restitution of $3,436.75 and a special assessment fee of $50 were also imposed. (#53). Defendant appealed. The Tenth Circuit Court of Appeals found three of the four stated reasons for upward departure to be invalid, and remanded for resentencing. United States v. Kelly, 1 F.3d 1137 (10th Cir. 1993).

At the second sentencing, the Court departed upward six levels based upon the grounds approved by the Tenth Circuit, specifically U.S.S.G § 5K2.8 (defendant's gratuitous infliction of injury upon his victim). The Court resentenced Defendant to 360 months imprisonment. (#62). Defendant again appealed, asserting that this Court's upward departure methodology was erroneous. The Tenth Circuit affirmed Defendant's sentence. United States v. Kelly, No. 93-5283, 1994 WL 209863 (May 26, 1994). The United States Supreme Court denied Defendant's petition for writ of certiorari on October 11, 1994.

On August 18, 1997, Defendant proceeding *pro se* filed this § 2255 motion raising three issues:

1. The sentencing court's upward departure methodology (use of §2A2.2 as measurement for increasing Mr. Kelly's offense level) was erroneous because "infliction of injury" is an inherent element of second degree murder already included in the applicable offense level.

2. Was in fact, Mr. Kelly's offense a crime of passion thereby committing error in its departing of the guidelines?

3. Did the judge abuse discretion by not taking Mr. Kelly's age into consideration requiring downward departure and the fact that he was a first time offender with no prior criminal conduct?

(#68 at 8). In its response filed June 11, 1998, the government asserts that the motion is untimely because it was filed outside the one-year time limitation established by § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). Defendant did not file a reply to the government's response raising the statute of limitations.

ANALYSIS

The government has raised the issue that Defendant's motion is time-barred because it was not filed until August 17, 1997, almost four months after the statute of limitations had elapsed. Prior to the enactment of the AEDPA on April 24, 1996, § 2255 contained no statute of limitations. The AEDPA amended 28 U.S.C. § 2255 by adding a time-limit provision. Specifically, 28 U.S.C. § 2255 now provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the fact supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997), the Tenth Circuit held that "prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motions before April 24, 1997." In so doing the Tenth Circuit allowed these prisoners a grace period of one year after the AEDPA's enactment within which to file their § 2255 motions.

On appeal to the Tenth Circuit after remand and resentencing, Defendant's sentence was affirmed on May 26, 1994. Defendant's petition for writ of certiorari was denied by the United States Supreme Court on October 11, 1994. Therefore, Defendant's conviction became final on

October 11, 1994. See Griffeth v. Kentucky, 479 U.S. 314, 321 n. 6 (1987). Pursuant to Simmonds, Defendant had until April 23, 1997 to file his motion under the limitations period set forth in § 2255(1). However, Defendant's § 2255 motion was not filed with the Court until August 17, 1997. Defendant has failed to offer any explanation for his delay in filing the § 2255 motion or to otherwise respond to the statute of limitations issue. Thus, the Court finds that Defendant's motion is clearly untimely and barred by the statute of limitations.

Therefore, because Defendant's § 2255 motion was filed after the expiration of the one-year limitations period, Defendant's motion must be dismissed as untimely pursuant to the authority of § 2255, as amended by the AEDPA.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (docket #68) is **dismissed with prejudice** as time-barred.

SO ORDERED THIS 17th day of Aug, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE SPALDING,)
)
Plaintiff,)
)
vs.) No. 97-CV-836-B
)
HILTI, INC.,)
Defendant.)

ORDER

Now on this 17th day of August, 1998, comes on for hearing Defendant Hilti, Inc.'s Motion for Summary Judgment (Docket # 5) and the Court, being fully advised, finds the same shall be granted.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated: "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

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burden of proof at trial."477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

STATEMENT OF UNCONTROVERTED FACTS [1]

The Court finds the following facts to be uncontroverted:

1. Hilti, Inc., ("Hilti") hired plaintiff Steve Spalding, ("Spalding") on or about April 4, 1993.

2. Spalding was 49 years old at the date of hiring. He worked for Hilti for more than three years.

3. Spalding learned of the opening at Hilti through the newspaper, called for an interview and was immediately hired.

4. Spalding was a "Purchasing Agent", which job duties included purchasing tooling, tool crib items, "R-4 Tooling", and maintenance, repair and operating ("MRO") supplies for the manufacturing plant.

5. Near the end of Spalding's employment, the purchasing department for Hilti altered its method of doing business, particularly as it related to Hilti's manufacturing plant. At the beginning of Spalding's employment , Hilti used a centralized purchasing department that purchased tools and supplies for the entire plant and headquarters operations.

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[1]Pursuant to N.D. LR. 56.1 B., Hilti's statement of undisputed facts is deemed admitted in that Spalding wholly failed to state any grounds or cite to any evidence or any reference in the record to controvert any fact asserted by Hilti. A mere recitation that a fact is controverted, without supporting authority, is not sufficient to create a controverted fact, particularly where Hilti has supported its statement of facts with references to the record and evidence in the case. The Court nevertheless reviewed the statement of undisputed facts and finds it to be substantially supported by the evidentiary material submitted. This order sets forth those facts deemed relevant for background purposes, unless otherwise referenced herein.

6. During the last year and a half of his employment, a decentralized purchasing system was implemented for the manufacturing plant whereby the purchasing function and responsibility moved from the centralized purchasing department and was given to the manufacturing plant personnel. This gave responsibility for purchasing and cost justification to the managers within the plant.

7. As a result, Spalding's job responsibilities were divided between several people and disbursed into the plant.

8. On October 3, 1996, Spalding was placed on "surplus" status and given the opportunity to bid on jobs which became open before December 31, 1996. As a result, Spalding was retained as an employee for approximately three months and given opportunities to interview on a preferential basis for openings within the company during that time.

9. Spalding brought this action against Hilti for being placed on "surplus" status and for his not being hired for two positions for which he thought he should have been hired while on "surplus" status.

10. Spalding had the least seniority of all the purchasing agents.

11. Spalding was selected to be "surplused" for several reasons. First, he was the least senior person in the department. Second, the majority of his purchasing responsibility for manufacturing had been transferred into the plant in the decentralization of the purchasing function which took place earlier in 1996 . Third, the need for a purchasing agent to support the R-4DWX tool had diminished, because of high inventory

levels and low demand. Finally, the manager over the function viewed Spalding as the least motivated and committed employee in the group. Spalding had been counseled about playing card games on the computer and generally took a more cavalier attitude toward work than did his cohorts.

12. The first position that Spalding contends he should have received is the Production Planner job in the Pins Department.

13. Spalding stated he wasn't quite sure what that job entailed.

14. The job duties of the Production Planner included some responsibility for purchasing but the essential job function is planning production. The posting sheet which was provided to Spalding at the time he applied for the job described this.

15. Spalding had no experience in Production Planning.

16. Jamie Jenkins was selected for the Production Planner position because he had far superior computer skills and more relevant work experience. Jenkins had worked in the department as a Production Planner for approximately six (6) months and had mastered the system that was in place. The position required a high level of computer skills in Oracle manufacturing package in addition to a high level of skill using spreadsheets and database applications. Jenkins had a degree in Computer Science and had experience in "master scheduling" or production planning. Spalding lacked the basic skills and experience.

17. Spalding was interviewed in response to a written bid. The rational for his no-selection was explained to him in a written memorandum dated November 5, 1996, from

Dennis Hagy, Manager of Training and Human Resources, Manufacturing.

18. Spalding also claims he should have been given the job of "Supervisor of Special Orders" in the Special Orders Department.

19. The position announcement for this position listed as the basic functions: responsibility for net sales, profitability and growth of Special Orders Department; managing performance of direct reports through Performance Management Program; Assisting in the development of the department's One Year Plan; managing the MIS functions of the department; researching market trends, applications and new product innovations; and, performing standard Purchasing Specialist functions.

20. Spalding lacked the sales, customer service, MIS and management background that was required by the position.

21. Andy Coe was selected for the position. He had been hired thirteen months before Spalding and had worked in the Special Orders Department for over one year as the Administrator of Special Orders. His experience in the job and in the Special Order Department was superior to Spalding's and he had a strong background in customer service, which Spalding did not.

22. To bid on posted job positions, applicants were required to notify the Human Resource Department in writing of their interest. Spalding was aware of this and submitted written applications on the two jobs referenced above but no others.

23. Spalding did not apply for any jobs that were posted after December 31, 1996. He obtained other employment and did not want to go back to Hilti.

24. Spalding was aware of a materials manager job advertised in the Tulsa World on or about January 19, 1997, but did not apply for it.

25. Spalding did not apply or inquire regarding a purchasing agent job advertised in the Tulsa World on or about June 8, 1997.

26. Spalding never heard anyone at Hilti make any comments about age.

Spalding filed response brief in which he lists three (3) allegedly controverted facts, followed by Hilti's contentions regarding them. None of Spalding's alleged controverted facts are supported by admissible evidence or reference to the record. Spalding instead recites that he "feels" the reason two younger employees were retained while he was terminated was because of his age; he "feels" the job posted on January 19, 1998, for which he was suited, was available to be posted in November of 1997, but that the posting was withheld until after his termination; and he contends the withholding was designed for the sole purpose of discontinuing his employment due to his age.

Under Spalding's own proffered legal authority, summary judgment must be granted to Hilti. Spalding cites to *MacDonald v. Eastern Wy. Mental Health Ctr.*, 941 F.2d 1115, 1117 (10th Cir. 1991) for the proposition that the Court must "...[v]iew the evidence and any possible inferences most favorably to the nonmoving party...". He urges that should the nonmoving party provide some (no matter how weighted), evidence from which it can be inferred that there is a factual dispute," the Courts must, have, and will find that such a material factual dispute exists." However, Spalding offered no evidence at all, but only argument.

This circuit revisited the applicable legal standard to be applied in an age discrimination case in *Coné v. Longmont United Hosp. Ass'n.*, 14 F.3d 526 (10th Cir.1994). The Court found "if a defendant articulates a legitimate non-discriminatory reason for its action, the burden of persuasion moves back to the plaintiff." Plaintiff must then "show that age was a determinative factor in the defendant's employment decision, or show that the defendant's explanation was merely pretext." The Court concluded that "Failure to come forward with evidence of pretext will entitle the defendant to judgment."

In its Motion for Summary Judgment, Hilti has articulated legitimate business reasons for its actions and there is no evidence presented by Spalding of pretext. The conclusory statements of counsel on behalf of plaintiff are not sufficient at this stage to raise a question of fact regarding pretext. *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir 1991). Summary judgment is therefore granted. A separate form of Judgment shall be filed contemporaneously with this Order.

IT IS SO ORDERED.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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FILED

AUG 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHANIE MARTIN, KENNETH MARTIN, and KELLY MARTIN, a minor,

Plaintiffs,

v.

JAY JACKSON, UNIVERSITY CHEVROLET-GEO, INC., an Oklahoma corporation, and LUCKY MOTOR, INC., a Texas Corporation,

Defendants.

ENTERED ON DOCKET
AUG 18 1998
DATE

Case No. 97CV800 H (J)

STIPULATION OF DISMISSAL

Plaintiffs, Stephanie Martin, Kenneth Martin, and Kelly Martin, and Defendant, Lucky Motor, Inc., through their respective attorneys, hereby stipulate to the dismissal with prejudice of this action against Lucky motor, Inc.

Dated at Tulsa, Oklahoma, this 14 day of August, 1998.

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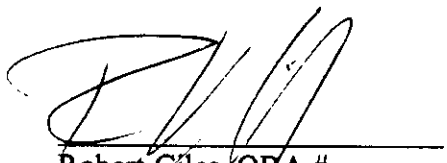
CJ



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Attorney for Lucky Motor, Inc.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAM BELL,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO. 97-CV-935-B (M)
	)	
VENTAIRE,	)	
	)	
DEFENDANT.	)	

ORDER

Before the Court for disposition is the Application For and Summary of Attorney's Fees and Costs of Defendant Ventaire Corporation [Dkt. 12].

The Court previously awarded Defendant its reasonable expenses, including attorney's fees, incurred in successfully litigating a motion to compel Plaintiff to respond to discovery requests. [Dkt. 10]. Defendant has now filed the pending application and supporting documentation seeking to establish the amount of the award at $1,381.00. Plaintiff's response recites that Plaintiff, Sam Bell, does not oppose Defendant's request for attorney's fees and costs in the amounts set forth in Defendant's pleading.

Based upon Defendant's application, Plaintiff's response and the Court's independent review of the application and supporting documentation, the Court finds that the requested fees are reasonable, both with regard to the time expended pursuing the motion and the rate charged for the legal services performed. The Court, therefore, GRANTS Defendant's application and ORDERS Plaintiff, Sam Bell, to pay to

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Defendant, Ventaire, the sum of $1,381.00 pursuant to the Court's order of July 8, 1998.

IT IS SO ORDERED this 14th day of August, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERIAL LIMITED,

Plaintiff,

v.

BEGGS PHARMACY, INC.,

Defendant.

Civil Action No. 98 CV 565 H (E)

DISMISSAL WITH PREJUDICE

Plaintiff Merial Limited, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby voluntarily dismisses the captioned action with prejudice to refiling the same.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
NTC OF AMERICA, INC.,	
Debtor.	
	Case No. 97-CV-0819-H (E)
JOHN WILLIAMS,	
Appellant,	
vs.	
EMPIRE FIRE & MARINE INSURANCE COMPANY and WESTPHALEN, BRADLEY & JAMES, INC.,	
Appellee.	

REPORT AND RECOMMENDATION

Appellant John Williams, as Plan Trustee pursuant to the Plan of Reorganization for NTC of America, Inc. ("NTC"), appeals the order and judgment of the Bankruptcy Court, Mickey D. Wilson, J., filed May 29, 1997 and docketed June 2, 1997 (R. Vol. I, Doc. #60) (hereinafter "Order of the Bankruptcy Court"). Having reviewed the pleadings, and for the reasons discussed below, the undersigned **RECOMMENDS** that the Order of the Bankruptcy Court be **AFFIRMED** in part and **REVERSED** in part.

I. JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 158. A bankruptcy court's conclusions of law are reviewed *de novo*, and findings of fact by a clearly erroneous standard.

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Tulsa Energy, Inc. v. KPL Production Co. (In re Tulsa Energy, Inc.), 111 F.3d 88, 89 (10th Cir. 1997).

II. BACKGROUND

For this factual statement, the undersigned relies on the stipulations between the parties filed with the Bankruptcy Court (R. Vol. I, Doc. #38, at 9-12) (hereinafter referred to as Stip. ¶ __).

NTC operated a trucking business engaged in the hauling of mobile homes and other structures. NTC obtained an insurance policy, later renewed, (the "Empire Policies") through Oklahoma General Agency from Empire Fire & Marine Insurance Company ("Empire") in or about 1985. (Stip. ¶ 3)

In 1987, Westphalen, Bradley & James, Inc. ("WB&J") entered into a non-exclusive general agency contract with Empire and succeeded Oklahoma General Agency as Empire's general agent for the Empire Policies. (Stip. ¶ 11) For all policies originated by WB&J, Empire billed WB&J each month through a monthly account statement balancing monthly credits, including commissions due WB&J, and debits on all policies originated by WB&J, to calculate a total amount due from WB&J to Empire. (Stip. ¶ 12) Empire entered a debit on the WB&J account statements for all policy holder premiums, including the NTC premiums on the Empire Policies. (Stip. ¶ 13) From 1987 until the Empire Policies terminated, the general agent handling the Empire Policies for Empire was WB&J. (Stip. ¶ 14) Premium payments due from NTC to Empire were guaranteed by WB&J. (Stip. ¶ 15) All payments paid by NTC on the Empire Policies from 1987 to the termination date were paid indirectly and directly through WB&J. (Stip. ¶ 16) The average NTC premium payment for the Empire Policies was approximately $120,000 per month, $1,440,000 per year. (Stip. ¶ 17)

As a condition to issuing the Empire Policies, Empire required NTC to pay a deposit to secure payments of the premiums in the amount of $250,530. (Stip. ¶ 4) To the extent the premiums on the Empire Policies were not paid, Empire had recourse against the deposit. (Stip. ¶ 5) At the end of each policy year, Empire's records reflected that an amount equal to $250,530 was credited on the statement of WB&J with a notation of a NTC policy number. (Stip. ¶ 6) Upon the annual renewal of the Empire Policies, Empire's statements to WB&J reflected that an amount equal to $250,530 was debited from WB&J and applied to a new NTC policy number. (Stip. ¶ 7)

Congress Financial Corporation (Central) ("Congress") entered into a security agreement with NTC dated November 23, 1987. (Stip. ¶ 8) Congress filed financing statements with the Oklahoma County Clerk on March 15, May 4, and July 12, 1988. (Stip. ¶ 9) Paragraph 4.1 of the security agreement states that Congress has a security interest in all deposit accounts (Paragraph 4.1(e)) and all other general intangibles (Paragraph 4.1(g)).[1] (Stip. ¶ 10)

NTC was unable to make the premium payments in their entirety for January and February of 1989. (Stip. ¶ 18). On April 6, 1989, WB&J and NTC entered into an agreement whereby WB&J agreed to allow NTC to delay payments to WB&J for NTC premiums due under the Empire Policies in January and February, 1989, in the amount of $204,111, plus 3.5% interest for a total of $211,255. (Stip. ¶ 19) In April 1989, NTC executed a promissory note to WB&J for the sum of $211,255 with 10% interest on delinquent payments ("Promissory Note"). (Stip. ¶ 20) The Promissory Note required a payment of $65,000 on September 1, 1989. (Stip. ¶ 21)

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[1] Congress, after NTC filed for bankruptcy and before NTC filed the complaint which began this adversary proceeding, assigned to NTC its right to pursue against Empire and WB&J any claims for infringement of the collateral secured by Congress' security interest. For clarity, the undersigned will refer to Congress, although the right to collect is asserted by NTC.

On or about April 21, 1989, Empire and NTC entered into a Contingent Return Premium Agreement. (Stip. ¶ 22) Pursuant to the Contingent Return Premium Agreement, Empire calculated a return to NTC in the amount of $63,792 for September 1, 1989. (Stip. ¶ 23)

On October 4, 1989, NTC issued a check to WB&J in the amount of $1,208 for the $65,000 installment payment due September 1, 1989 pursuant to the Promissory Note. (Stip. ¶ 24) The difference between the $65,000 payment due and the NTC payment of $1,208.00 is $63,792.[2] (Stip. ¶ 25) A credit of $63,792 was entered by Empire on WB&J's account statement in April 1990. (Stip. ¶ 26)

The amount owed for premiums not paid by NTC on the Empire Policies for the months of August, September, October, and November 1989 was $291,954.50. (Stip. ¶ 28) After giving credit for all payments made by NTC and the amounts due under the Contingent Return Premium Agreement, the balance due on the Promissory Note was $34,375.50. (Stip. ¶ 29)

On November 17, 1989, Empire mailed its Notice of Cancellation of the Empire Policies for reason of non-payment of premiums. (Stip. ¶ 30) The Empire Policies were canceled effective December 1, 1989. (Stip. ¶ 31)

On November 17, 1989, NTC and WB&J entered into an assignment which provided:

> For value received, assignor [NTC] unconditionally sells, assigns, transfers and conveys to [WB&J] all of assignor's right, title and interest in and to any and all sums of money now due or to become due in the future on any profit sharing agreements or deposits payable from Empire.
>
> * * *

---

[2] The $63,792 reflected the amount to which NTC believed it had become entitled to under the Contingent Return Premium Agreement.

> Any funds received by assignee in excess of premium amounts due assignee shall be refunded to assignor.

(Stip. ¶ 27)

In February 1990, Empire entered a credit in the amount of $278,924 on the account statement to WB&J for the Final Cancellation and Premium Adjustment on the Empire Policies. (Stip. ¶ 32) The amount of $278,924 represents a credit for the $250,530 deposit on the Empire Policies and a premium overcharge adjustment of $28,394 on the Empire Policies. (Stip. ¶ 33)

NTC filed for bankruptcy on March 1, 1990. (Stip. ¶ 34) The 90-day preference period began December 1, 1989. (Stip. ¶ 35) NTC was insolvent during the ninety days preceding the bankruptcy filing. (Stip. ¶ 36)

III. REVIEW

NTC filed a complaint commencing an adversary proceeding against Empire and WB&J on August 14, 1991. The adversary proceeding is a dispute over the above-described deposit ($250,530), the premium overcharge adjustment ($28,394), and the Contingent Return Premium Agreement refund ($63,792). On May 29, 1997, the Bankruptcy Court entered its order that NTC recover nothing. This appeal by the Plan Trustee followed.

Appellant asserts that the Bankruptcy Court erred when it held that the $250,530 deposit, the $28,394 premium overcharge adjustment, and the $63,792 Contingent Return Premium Agreement refund are not subject to recovery by the Plan Trustee. The Plan Trustee's appeal presents three issues: (1) whether the priority of various security interests was properly ascertained; (2) whether the transfers are avoidable as impermissible preferences under Section 547 of the Bankruptcy Code; and

(3) whether the transfers are recoverable as impermissible setoffs under Section 553 of the Bankruptcy Code.[3]

As an initial matter, the undersigned recommends the following findings as to the nature of the various contracts involved in this dispute. Any contrary findings by the Bankruptcy Court are recommended by the undersigned to be found clearly erroneous.

- **The Empire Policies**

The 1985 insurance contract, later renewed, between NTC and Empire required NTC to pay a $250,530 deposit, to be held by Empire in reserve against shortfalls in payment of future premiums. The insurance contract stated: "[NTC] agree[s] to pay the deposit premium shown in the Common Policy Declarations at the policy inception. This deposit premium will be held by us until all [premiums, in various forms] have been paid to us." Doc. # 48, Exhibit 17, at 12 (unnumbered). Upon payment of premiums and at the end of the policy period, the deposit was refundable to NTC.

The premiums payable by NTC were to be calculated on a per auto basis. Id. Because of expected delays in the recording of data, monthly premiums were to be pre-paid based on a more-immediately calculable figure of "loaded mileage deposits," which are defined as the "total loaded miles driven transporting property under bill of lading or shipping receipt of all revenue-producing autos." Id. at 13 (unnumbered). At the end of the policy term, the total earned premium--as calculated on a per auto basis--was compared to the loaded mileage deposits, and a premium adjustment determined.

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[3] Although appellant originally listed numerous issues on appeal, these are the issues that were briefed and, thus, the issues reviewed by the undersigned.

- **The March 2, 1987 Agency Agreement Between Empire and WB&J**

The agency agreement between Empire and WB&J grants WB&J the authority

a. To solicit, receive and transmit to Company applications for the classes of insurance which Company may from time to time authorize and for which a commission is specified in the attached Commission Schedule or Schedules, in accordance with the underwriting rules and regulations of Company and the laws and insurance regulations of the states authorized.

b. To bind, execute and service contracts of insurance, certificates and endorsements relating thereto, and forms approved by company, to which this agreement applies but only as specifically authorized and provided in the Schedule of Binding Authority forming part of this agreement. This Schedule of Binding Authority may be amended or supplemented by Company from time to time by written notice of not less than thirty (30) days from Company to Agent. Agent agrees to forward copies of all policies, certificates, endorsements issued by Agent, not later than the tenth working day following the effective date of coverage or the date of acceptance of such coverage, whichever occurs first. Agent further agrees to provide the Company with copies of all binders immediately upon issuance.

c. To Collect [sic], receive and receipt for premiums on business placed with Company by Agent, and to retain out of premiums so collected, as full compensation for such business, commissions at rates mutually agreed upon between Company and Agent.

R. Vol. I, Doc. #48, Exhibit 1, at 4 (unnumbered). The Agency Agreement also provides:

> Agent is authorized to advance premiums on behalf of policy-holders, in which event Agent accepts full responsibility for collection of such premiums.

Id. at 5.

An agency relationship may pertain to some functions and not others. In re Schulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984) ("Even though a person is termed an agent, he may, in fact, act as such in some matters but not in others."). The obligations of the parties are controlled by their contractual relationship. The contractual relationship between Empire and WB&J established a clear divergence of interests and obligations in a variety of aspects. The ordinary course of business between these two companies was that NTC paid premiums to WB&J and WB&J

paid Empire. WB&J guaranteed NTC's payment of premiums to Empire. During certain months, when NTC failed to make payments to WB&J, WB&J deferred the payments, and NTC executed a promissory note to WB&J. Each month, account statements were sent from Empire to WB&J, and WB&J paid Empire for any amounts owed. To the extent the Bankruptcy Court found that Empire and WB&J had identical interests and obligations, or that WB&J was the agent of Empire for all purposes, or that the relations between Empire and WB&J are "superficial complications" (Order of the Bankruptcy Court at 10), the undersigned recommends that the District Court find that those findings are clearly erroneous.

- **The April 21, 1989 Contingent Return Premium Agreement**

The Contingent Return Premium Agreement between Empire and NTC, entered into April 21, 1989, provided that Empire would refund to NTC part of the premiums paid by NTC if NTC decreased its claim rate. Thus, NTC would share the profits caused by a decrease in claims. The Contingent Return Premium Agreement created a contract right on behalf of NTC to share in these profits and earn a return. The return in issue was earned as of September 1, 1989, calculated as of October 1, 1989, and credited to WB&J by Empire on its April 1990 account statement. (Stip. ¶ 26)

- **The November 17, 1989 Assignment**

In a document dated November 17, 1989, NTC assigned WB&J certain property. An important threshold question is whether that assignment was absolute or granted WB&J a security interest in the properties described in the assignment.

Oklahoma defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation. . . ." Okla. Stat. tit. 12A, § 1-201(37)(a). An absolute assignment transfers all right, title, and interest in specified property. "To determine whether

the agreement at issue was a security or absolute assignment, the Court must search for the intent of the parties. This intent is to be discerned from the contents of the document, the testimony of the contracting parties, and the circumstances surrounding the transaction." Goldstein v. Madison National Bank of Washington, D.C., 88 B.R. 274, 276 (D.D.C. 1988).

The Bankruptcy Court concluded that the November 17, 1989 assignment was "absolute, to the extent of NTC's debt." Order of the Bankruptcy Court at 11. The undersigned disagrees. At first glance, the agreement does appear to be an absolute assignment. The agreement states "assignor [NTC] unconditionally sells, assigns, transfers and conveys to [WB&J] all of assignor's right, title and interest in and to any and all sums of money now due or to become due in the future on any profit sharing agreements or deposits payable from Empire." Doc. #48, Exhibit 9, at 1. However, it has been established that

> [i]t is substance and not form which is decisive in determining whether an agreement is intended to create a security interest. Therefore, the Court must analyze the contract to determine what rights and obligations have been created. In other words, the real test is what the contract actually does, rather than what it superficially says.

Adelman v. General Motors Acceptance Corp. (In re Tulsa Port Warehouse Co., Inc.), 4 B.R. 801, 805 (N.D. Okla. 1980), aff'd, 690 F.2d 809 (10th Cir. 1982). At the time of the agreement, NTC was indebted to WB&J for unpaid premiums and the balance of the Promissory Note. Handwritten into the agreement and initialed by both parties is the following:

> Any funds received by Assignee in excess of premium amounts due Assignee shall be refunded to Assignor.

Id. at 2. This promise to return any overage evidences that the assignment was not intended to be absolute, but to create a security interest. See, e.g., Okla. Stat. tit. 12A, §§ 9-502(2), 9-504(2). In the trial before the Bankruptcy Court, Robert Edward Peterson, former Chief Financial Officer of

NTC who signed the November 17, 1989 assignment, was asked if it "was [his] understanding that [the] assignment was basically given in security for payment of Mr. Westphalen [a principal of WB&J]." (R. Vol. III, Doc. #73, at 31) Peterson answered, "That's right." Id. The undersigned recommends that the District Court find that the intent of the parties in executing the November 17, 1989 agreement was to secure payment of WB&J's claim against NTC by granting WB&J a security interest in assets of NTC to the extent of WB&J's claim. The undersigned recommends that the District Court find that the November 17, 1989 agreement created a security interest.

The assignment describes the properties at issue: "profit sharing agreements," specifically the Contingent Return Premium Agreement refund, and "deposits payable," specifically the $250,530 deposit and the $28,394 loaded mileage deposits, i.e. premium overcharge adjustment. Thus, based on the clear language of the agreement, the undersigned recommends that the District Court find that NTC transferred to WB&J a security interest in the $250,530 deposit, the $28,394 premium overcharge, and the $63,792 Contingent Return Premium Agreement refund.

- **The November 23, 1987 Security Agreement**

The November 23, 1987 security agreement between NTC and Congress granted Congress a security interest in

> All present and future (a) Accounts; (b) moneys, securities and other property and the proceeds thereof, now or hereafter held or received by, or in transit to, you from or for us, whether for safekeeping, pledge, custody, transmission, collection or otherwise, and all of our deposits (general or special), balances, sums and credits with you at any time existing; (c) all of our right title and interest, and all of our rights, remedies, security and liens, in, to and in respect of the Accounts and other Collateral, including, without limitation, rights of stoppage in transit, replevin, repossession and reclamation and other rights and remedies of an unpaid vendor, lienor or secured party, guaranties or other contracts of suretyship with respect to the Accounts, deposits or other security for the obligation of any Account Debtor, and credit and other insurance; (d) all of our right, title and interest in, to and in respect of all goods

> relating to, or which by sale have resulted in, Accounts including, without limitation, all goods described in invoices, documents, contracts or instruments with respect to, or otherwise representing or evidencing, any Accounts or other Collateral, including without limitation, all returned, reclaimed or repossessed goods; (e) all deposit accounts; (f) all books, records, ledger cards, computer programs, and other property and general intangibles evidencing or relating to the Accounts and any other Collateral or any Account Debtor, together with the file cabinets or containers in which the foregoing are stored ("Records"); (g) all other general intangibles of every kind and description, including without limitation, trade names and trademarks, and the goodwill of the business symbolized thereby, patents, copyrights, licenses and Federal, State and local tax refund claims of all kinds and (h) all proceeds of the foregoing, in any form, including, without limitation, any claims against third parties for loss or damage to or destruction of any or all of the foregoing.

Doc. #48, Exhibit 10, at 3 (unnumbered).

The security agreement contains a choice of law provision which calls for application of the law of Illinois. Section 9-104(g) of the Uniform Commercial Code ("U.C.C.") as adopted in Illinois--like Section 9-104(f) of the U.C.C. as adopted in Oklahoma--excludes from the U.C.C. a "transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds as described in Section 9-306 of the title and priorities in proceeds as described in Section 9-312 of this title." Ill. Ann. Stat. ch. 810, § 5/9-104(g); Okla. Stat. tit. 12A, § 9-104(f). The issue is whether Congress had a security interest in the deposit payable, the premium overcharge adjustment, and/or the Contingent Return Premium Agreement refund.

NTC's rights to the $250,530 deposit payable and the $28,394 premium overcharge adjustment were created by its insurance contract with Empire. Those categories and how they became payable were specifically provided for in the Empire policies, and thus are interests or claims in or under a policy of insurance. The parties to the 1987 security agreement presumably were aware that an interest or claim in or under a policy of insurance is excluded from the U.C.C. The 1987 security agreement contains no language which evidences an intent to create a security interest in

assets beyond the scope of the U.C.C., specifically as to interests in or under a policy or claim of insurance.[4] Appellant did not show on appeal, nor does the record reflect, any separate action by Congress to create or perfect a security interest in an interest in or a claim in or under a policy of insurance. The undersigned recommends that the District Court find that the 1987 security agreement between NTC and Congress did not create a security interest in the deposit payable or the premium overcharge adjustment. See In re Barton Industries, Inc., 104 F.3d 1241, 1246 (10th Cir. 1997).

However, the Contingent Return Premium Agreement was a separate agreement which, although related to the Empire Policies in its operation, did not give rise to an interest or claim in or under a policy of insurance. The Contingent Return Premium Agreement created a right for NTC to share in the profits of its insurer in exchange for NTC's decreasing the claims it made under the insurance policy. While NTC's insurance policy with Empire was certainly an important aspect of the business relationship which led to the Contingent Return Premium Agreement, such agreement was separate from the insurance contract and did not transfer an interest or claim in or under a policy of insurance.

In the security agreement with Congress, NTC grants a security interest in general intangibles. Section 9-106 of the U.C.C. defines general intangibles:

> "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money. All rights to payment

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[4] The undersigned reads the reference in subsection (c), which grants a security interest in "all of [NTC's] right title and interest, and all of [NTC's] rights, remedies, security and liens, in, to and in respect of the Accounts and other Collateral, including. . . credit and other insurance," to speak only to those interests in insurance for which the U.C.C. governs the creation of a security interest, specifically proceeds or priorities in proceeds. This language is not sufficient to create a security interest in the deposit payable or premium overcharge adjustment.

> earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

Ill. Ann. Stat. ch. 810, § 5/9-106. The Contingent Return Premium Agreement created a right for NTC to earn a refund (return). A contractual right to earn a refund is personal property and not a good, account, chattel paper, document, instrument, investment property, right to proceeds of a written letter of credit, or money. The undersigned recommends a finding that the right to a refund created by the Contingent Return Premium Agreement is a general intangible and was covered by the 1987 security agreement between Congress and NTC. Thus, the undersigned recommends that the District Court find that the 1987 security agreement granted Congress a security interest in the Contingent Return Premium Agreement refund.

A. PRIORITY

Appellant challenges the Bankruptcy Court's determination that WB&J had priority as to the $63,792 Contingent Return Premium Agreement refund, and asserts that Congress' interest (now advanced by NTC) has priority. Appellant did not brief the priority of the parties with regard to the $250,530 deposit payable or the $28,394 premium overcharge adjustment.[5] Therefore, the

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[5] Because appellant failed to brief such issues, the undersigned recommends a finding that appellant has not shown the Bankruptcy Court's findings concerning the priority with regard to these two amounts to be clearly erroneous or legal conclusions to be incorrect. Moreover, in appellant's statement of issues (R. Vol. I, Docket #64, at 3), he raised priority regarding the deposit only as between Empire and Congress, and not as between WB&J and Congress.

The undersigned notes that appellant would not have prevailed even if the issue of priority as to the $250,530 deposit payable and $28,394 premium overcharge adjustment had been briefed. As discussed *supra*, the 1987 security agreement between Congress and NTC did not create a security interest on behalf of Congress in either the deposit payable or the premium overcharge adjustment, and thus Congress has no prior interest in them.

undersigned confines the priority analysis to the $63,792 Contingent Return Premium Agreement refund.

Pursuant to the November 17, 1989 agreement, WB&J took a security interest in the $63,792 Contingent Return Premium Agreement refund. That security interest is governed by the U.C.C. As discussed *supra*, NTC granted a security interest to Congress in the Contingent Return Premium Agreement refund pursuant to the 1987 security agreement between Congress and NTC. That security interest is governed by the U.C.C. Thus, the dispute narrows to whether Congress' security interest in the Contingent Return Premium Agreement refund is prior to WB&J's. Because both security interests are governed by the U.C.C., the dispute is governed by the U.C.C.

Section 9-312(5)(a) of the U.C.C. provides that

> [C]onflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

Ill. Ann. Stat. ch. 810, § 5/9-312(5)(a); Okla. Stat. tit. 12A, § 9-312(5)(a). The parties have stipulated that following the execution of the 1987 security agreement between Congress and NTC, Congress filed financing statements with the Oklahoma County Clerk on March 15, May 4, and July 12, 1988. (Stip. ¶ 9) Thus, Congress perfected its security interest in the Contingent Return Premium Agreement no later than July 12, 1988. WB&J's security interest--created by the November 17, 1989 assignment--could be perfected no earlier than November 17, 1989. Congress' security interest was perfected earlier that WB&J's. Therefore, Congress' security interest in the Contingent Return Premium Agreement refund is prior to WB&J's. The undersigned recommends

that the District Court find that, as to the $63,792 Contingent Return Premium Agreement refund, Congress has priority over WB&J.

B. PREFERENCE

Appellant challenges the transfers of the $250,530 deposit payable and the $28,394 premium overcharge adjustment, asserting that such transfers are avoidable as impermissible preferences.[6] Section 547 of the Bankruptcy Code allows a trustee to avoid certain pre-petition transfers of an interest of the debtor in property. Such transfers must be:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made--
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Because no insider status is alleged, or exists, the transfers are not avoidable under Section 547(b) unless they occurred on or within 90 days before March 1, 1990--the day NTC filed its

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[6] Appellant also challenges the Bankruptcy Court's findings on preference and setoff in regard to the $63,792 Contingent Return Premium Agreement refund. However, it is unnecessary for the undersigned to consider those arguments because of the undersigned's conclusion regarding priority.

petition for bankruptcy. At issue are the transfers of the three amounts from NTC to WB&J. The assignment agreement between NTC and WB&J was executed November 17, 1989, 104 days before NTC filed its petition. If the date of the transfers was the date of the agreement, the transfers are not avoidable under Section 547(b).

The nature of the November 17, 1989 agreement between NTC and WB&J--whether it was an absolute assignment or a security agreement--is critical to a determination of the time of transfer. The time of transfer for an absolute assignment is the time of assignment; the time of transfer for a grant of a security interest is the time of perfection. See Goldstein v. Madison National Bank of Washington, D.C., 88 B.R. 274, 275 (D.D.C. 1988); In re Adventist Living Centers, Inc., 174 B.R. 505, 512 (N.D. Ill. 1994); In re Jacobson, 54 B.R. 72, 74 (Bankr. D. Minn. 1985). As discussed *supra*, the undersigned has recommended a finding that the November 17, 1989 assignment granted WB&J a security interest in the deposit payable, the premium overcharge adjustment, and the Contingent Return Premium Agreement refund. Therefore, transfer occurred at the time of perfection.

While, typically, questions of perfection are answered by application of the U.C.C., Section 9-104(f) of the U.C.C. as adopted in Oklahoma specifically exempts from application of the U.C.C. a "transfer of an interest in or claim in or under any policy of insurance. . . ." Okla. Stat. tit. 12A, § 9-104(f). As discussed *supra*, the undersigned has recommended a finding that the deposit payable and premium overcharge adjustment are interests in a policy of insurance and, thus, any security interest in them are excluded from the coverage of the U.C.C. Therefore, the undersigned recommends a finding that the time of perfection of the deposit payable and the premium overcharge

adjustment is governed by Oklahoma common law, and not the U.C.C. See In re Barton Industries, Inc., 104 F.3d 1241, 1246 (10th Cir. 1997).

The Tenth Circuit, in Barton Industries, discussed the analysis of security agreements not governed by the U.C.C. "Where the U.C.C. is inapplicable, security interest disputes may be resolved by reference to: existing statutes and pre-code case law; analogy to the U.C.C.; and reference to case law from other jurisdictions." 104 F.3d at 1246-1247. The Tenth Circuit, by reference to case law from other states without specific statutes which define the method of perfection of a security interest in an interest or claim in or under a policy of insurance, recognized that perfection may occur when the secured party "execute[s] the agreement and/or ha[s] possession of the agreement." Id. at 1247. The assignment agreement was executed November 17, 1989. Thus, the agreement was perfected November 17, 1989. Thus, the date of transfer for purposes of Section 547 is November 17, 1989.

Such date is outside the 90-day avoidance period for preferential transfers. The undersigned recommends that the District Court find that transfers of the $250,530 deposit payable or the $28,394 premium overcharge adjustment are not avoidable under Section 547.

C. SETOFF

The Bankruptcy Code preserves a creditor's right to set off "a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." 11 U.S.C. § 553(a). Section 553(b), however, provides that certain setoffs may be recovered by the trustee.

1. Alleged Setoff Between Empire and NTC

The Bankruptcy Court found that "[i]f there was a setoff, it occurred essentially between Empire and NTC." Order of the Bankruptcy Court at 11. However, the Bankruptcy Court denied recovery, finding that any such setoff must have occurred at the time of NTC's assignment to WB&J and, thus, fell outside the 90-day recovery period of Section 553(b). Id.

A setoff within the meaning of Section 553 requires mutual debts. For a setoff to have occurred between Empire and NTC, there would have had to have been (1) a debt of Empire to NTC, and (2) a claim by Empire against NTC. Empire was indebted to NTC for the amount of the deposit payable, the premium overcharge, and the Contingent Return Premium Agreement refund. Empire did not set off those amounts owed to NTC against a claim by Empire against NTC. Empire, instead issued a credit for those amounts on the WB&J monthly account. Therefore, there was no setoff between Empire and NTC. To the extent the Bankruptcy Court found to the contrary, the undersigned recommends that the District Court find such ruling to be clearly erroneous.

2. Alleged Setoff Between WB&J and NTC

A) Alleged Impermissible Transfer of a Claim or Debt Under Section 553(a)

Appellant asserts "Empire transferred the amounts owed to NTC to [WB&J] who setoff these amounts against the debt NTC owed it. This transfer of a debt to [WB&J] is prohibited under section 553(a)(2)." Appellant's Brief in Chief, at 20. Section 553(a) forbids setoff where:

> (1) the claim of such creditor against the debtor is disallowed;
>
> (2) such claim was transferred, by an entity other than the debtor, to such creditor--
> (A) after the commencement of the case; or
> (B) (i) after 90 days before the date of the filing of the petition; and
> (ii) while the debtor was insolvent.

(3) the debt owed to the debtor by such creditor was incurred by such creditor--
(A) after 90 days before the date of the filing of the petition;
(B) while the debtor was insolvent; and
(C) for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. § 553(a).

Section 553(a)(2) was designed to prevent the trafficking of offsettable claims by creditors attempting to take advantage of the setoff provisions and thereby artfully circumvent the Bankruptcy Code. Section 553(a)(2), however, is inapplicable to the facts of this case. The transfer argued by appellant was not a transfer of a claim of one creditor (Empire) to another creditor (WB&J), as contemplated by Section 553(a)(2), but--as appellant clearly states--a transfer of a debt to the debtor by one creditor (Empire) to another creditor (WB&J).

Section 553(a)(3) speaks to the incurrence of debts owed to the debtor by a creditor. While appellant failed to raise Section 553(a)(3), the undersigned notes that Section 553(a)(3) would also provide appellant no relief. WB&J did not incur a debt to NTC for the purpose of obtaining a right of setoff against NTC as required by Section 553(a)(3)(C). Any debt owed by WB&J to NTC arising out of the deposit payable, the premium overcharge, or Contingent Return Premium Agreement was incurred pursuant to the Empire Policies, the agency agreement between Empire and WB&J, the Contingent Return Premium Agreement, and the overall business arrangement of Empire, WB&J, and NTC.

B) Recovery Under Section 553(b)

Section 553(b) provides that, in certain instances, a trustee may recover the setoff of mutual debts which arose before the commencement of a bankruptcy case.

When the deposit and the premium overcharge became payable to NTC, the contractual relationship among WB&J, Empire, and NTC allowed Empire to credit amounts to WB&J. In February 1990, Empire credited WB&J's account in the amount of $278,924--such amount representing the $250,530 deposit payable and the $28,394 premium overcharge adjustment. Thus, WB&J was indebted to NTC for $278,924.

NTC had failed to fully pay WB&J the premiums owed pursuant to the Empire Policies and the monies owed pursuant to the promissory note. Thus, WB&J had a claim against NTC for over $300,000.

Upon Empire crediting WB&J's account in the amount of $278,924, WB&J--rather than paying NTC--applied such amount against its $300,000-plus claim against NTC. The issue is whether such action constitutes a recoverable setoff under Section 553(b).

The difference between the circumstances presented by this case and a setoff as contemplated by Section 553 lies in the fact that WB&J held a security interest in the deposits payable. "Various authorities, cases, and commentators have noted that the rules in Section 553 do not apply with respect to set-offs that are in fact seizure of property subject to a security interest." Smith v. Mark Twain National Bank, 805 F.2d 278, 290 (8th Cir. 1986) (quotations and citations omitted). The rationale for such treatment is clear. The Third Circuit has described the purpose of setoff, stating: "Setoff, in effect, elevates an unsecured claim to secured status, to the extent that the debtor has a mutual, pre-petition claim against the creditor." Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984). Setoff serves no purpose where the creditor holds a secured claim. The undersigned recommends that the District Court follow those cases which hold that Section 553 does not apply where there is a valid foreclosure of a perfected security interest.

The question then becomes whether WB&J's actions in regard to its security interest, granted pursuant to the November 17, 1989 assignment and perfected upon execution, constituted a valid foreclosure of that security interest. Article 9-501(1) of the U.C.C. provides

> When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part, and except as limited by subsection (3) of this section, *those provided in the security agreement*. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. . . .

Okla. Stat. tit. 12A, § 9-501(1) (emphasis added). The November 17, 1989 assignment granted WB&J the power and authority detailed as follows:

> Assignor [NTC] gives to assignee [WB&J], its executors, administrators, personal representatives, agents and assigns, the full power and authority, for assignee's own use and benefit, but at assignee's own cost, to ask, demand, collect, receive, compound, and give acquittance and release for the same, or any part therefor, and in assignor's name or otherwise, to prosecute and withdraw any suit or proceedings at law or in equity regarding [the assignment of a secured interest in the deposits payable and the Contingent Return Premium Agreement refund].

Doc. #48, Exhibit 9, at 1. The assignment further stated:

> The title and right of possession to [the secured interest in the deposits payable and Contingent Return Premium Agreement refund] is to be and remain in assignee. It shall have the right at any time, at its option, to collect the same, or any party thereof [sic], from the debtor, Empire, or other holder.

Doc. #48, Exhibit 9, at 2. WB&J, in seizing the $278,924 in collateral, was validly exercising its rights as a secured creditor pursuant to the November 17, 1989 assignment and Article 9-501 of the U.C.C. The undersigned recommends a finding that Section 553 is inapplicable to the facts of the case at bar and that the trustee may not recover the $250,530 deposit or the $28,394 premium overcharge adjustment as impermissible setoffs.

IV. CONCLUSION

For the reasons discussed above, the undersigned recommends that the District Court find that the Bankruptcy Court correctly ordered that NTC not recover the $250,530 deposit and the $28,394 premium overcharge adjustment. The undersigned recommends that the District Court find that the Bankruptcy Court clearly erred in failing to determine that Congress' security interest in the $63,792 Contingent Return Premium Agreement refund was prior to WB&J's. The undersigned recommends that the Order of the Bankruptcy Court be **AFFIRMED** in part and **REVERSED** in part.

V. OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver of right to appeal).

DATED this 14th day of August, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JORDAN MCLESKEY,

Plaintiff,

v.

ALLSTATE INSURANCE Company, a foreign corporation,

Defendant.

No. 98-CV-0231H(E)

ORDER OF REMAND

This cause comes before the Court on the Joint Motion To Remand to State Court, filed by the parties. After considering said Motion, the Court hereby grants same. This action is hereby remanded to the District Court in and for Tulsa County, State of Oklahoma.

IT IS SO ORDERED this 12TH day of August, 1998.

Sven Erik Holmes, United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA L. SMITH for
RODNEY R. SMITH, a minor,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 97-CV-1039-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 14th day of AUG, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(16)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBRA L. SMITH for RODNEY R. SMITH, a minor,	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-1039-M**
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
Defendant.	)	

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

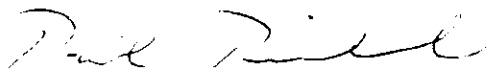
DATED this 14th day of AUG 1998.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

(15)

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY W. WILSON, **SSN: 447-42-0315,** **Plaintiff,** **v.** **KENNETH S. APFEL,** **Commissioner of Social Security,** **Defendant.**	)	**Case No. 96-CV-0635-EA**

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 14th day of August 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY W. WILSON, **SSN: 447-42-0315,**	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0635-EA**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	
Defendant.	)	

ORDER

Claimant, Jerry W. Wilson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 On February 1, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially (March 10, 1994), and on reconsideration (May 4, 1994). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held February 10, 1995, in Tulsa, Oklahoma. By decision dated May 3, 1995, the ALJ found that claimant was not disabled on or before December 31, 1998 (the date claimant was last insured for disability benefits under Title II). On May 9, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant was born September 15, 1944. He lived in Drumright, Oklahoma at the time of filing of his complaint. Claimant attended school through the ninth grade. He has worked as a laborer for asphalt paving, mechanic (untrained--thus, at the level of floor service worker), spray-painter, driver of oil field trucks, grinder and coater of valves, and laborer for drilling of water wells. He asserts an alleged onset date of December 1, 1992. Claimant asserts that following a failed attempt to return to work, he has since April 1993 been unable to work due to low back pain radiating into his left hip, leg, and both feet, as well as numbness and pain in his right elbow and hand.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

The only issue now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole,

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[3] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work, subject to the following limitations: claimant can only lift or carry 20 pounds occasionally and 10 pounds frequently; claimant can only bend or stoop occasionally; and claimant suffers from chronic pain which with medication does not preclude the above activities. The ALJ concluded that claimant could not perform his past relevant work, but that there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant, in Plaintiff's Brief and Statement of Specific Errors (Docket #23), failed to list--as ordered by this Court, see Scheduling Order (Docket #9)--the specific errors from which he appeals. The Court derives the following issues on appeal from claimant's brief:

A. The ALJ failed to properly assess claimant's RFC;

B. The ALJ failed to give proper weight to the opinions of Drs. Martin and Harper;

C. The ALJ failed to properly consider whether claimant's right elbow and hand were impaired;

D. The ALJ failed to properly evaluate claimant's credibility and allegations of disabling pain;

E. At Step Five, the ALJ failed to establish that claimant has transferrable skills.

A. Claimant's RFC

In October 1992, claimant injured his back. Claimant had previously had two surgeries for back injuries, once in 1975 (R. 174-186) and again in 1980 (R. 187-209). After being treated with cortisone injections and continuing to have pain, claimant in December 1992 went to the emergency room at Cushing Regional Hospital. (R. 210) After stating that he felt better, claimant was released to light work. (R. 134). However, he soon complained that the pain had returned. Id. Claimant was admitted to St. Francis Hospital in June 1993 for back surgery. The procedure, performed by Drs. Billings and Robertson, included a lumbar laminectomy, medial facetectomy, and foraminotomy at both L4-5 and L5-S1, neural arch laminectomy at L4-5, disk excision at both L4-5 bilateral and L5-S1 bilateral, stabilization at L4-5 and L5-S1 with bilateral Rogozinski pedicle screws and rods with cross links, and bilateral lateral mass fusion of L4 to sacrum using autogenous left iliac donor bone. (R. 141)

Dr. Billings, in December 1993, stated that "[Claimant] seems to be progressing satisfactorily. He was to continue his therapy anticipating that he would be discharged to return to work in three months." (R. 165) Dr. Robertson, claimant's treating physician for purposes of Social Security review, monitored claimant's progress following surgery. (R. 156-160) In February 1994, seven and one-half months after the surgery, Dr. Robertson stated that claimant was doing well, with "marked relief of back and leg pain as compared to his preoperative state." (R. 160) Dr. Robinson further stated:

> I do not feel [claimant] will ever get back to an occupation which requires manual labor but at this time I feel he can begin to perform light duty work with a lifting restriction of 20 pounds. I feel it would be appropriate for him to consider vocational rehabilitation training in order to get him into an occupation which he can do without stress to his back.

Id.

The ALJ found that claimant had the RFC to perform light work, subject to claimant only being able to lift or carry 20 pounds occasionally and 10 pounds frequently and only being able to bend or stoop occasionally. The ALJ found that claimant suffered from chronic pain, but stated that such pain, with medication, did not further limit claimant's RFC.

Social Security regulations define light work as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b).

Substantial evidence is more than a scintilla and less than a preponderance. Richardson, 402 U.S. at 401, 91 S. Ct. at 1427, 28 L. Ed.2d 842. "[This Court] closely examine[s] the record as a whole to determine whether substantial evidence supports the [Commissioner's] decision, and . . . fully consider[s] the evidence that detracts from [the] decision." Cruse v. United States Dep't. of Health and Human Servs., 49 F.3d 614, 617 (10th Cir. 1995). This Court has carefully reviewed the record on appeal, as well as the briefs submitted by the parties. Applying the standards set out above, the Court finds that substantial evidence supports the ALJ's determination that claimant may perform

light work, if limited to being able to lift or carry 20 pounds occasionally and 10 pounds frequently and only being able to bend or stoop occasionally.

B. ***The Opinions of Drs. Martin and Harper***

Nor are the opinions of Drs. Martin and Harper, when weighed against the remainder of the medical evidence and when considered in light of the standard of review required of this Court, sufficient to cause this Court to upset the determination of the ALJ. The ALJ stated "The undersigned cannot accord great weight to the assessment by Jim Martin, M.D.," listing his reasons for rejecting the opinion of Dr. Martin as: (1) Dr. Martin was not a treating physician, but only an examining physician for the purpose of determining worker's compensation disability; (2) Dr. Martin's opinion was reached during the same general time frame as an opposing opinion by claimant's treating physician; (3) Dr. Martin's assessment included factors not relevant to a determination of disability within the meaning of the Social Security Act, namely factors relevant to worker's compensation such as actual surgical procedures, actual injury impairment, and pain and functional loss; and (4) Dr. Martin's evaluation of claimant occurred "only a few months before"[4] claimant was seen for a kidney stone infection, perhaps causing a misidentification of the source and extent of claimant's pain and range of motion. The ALJ also rejected two reports by Dr. Harper as (1) not made by a treating physician, and (2) premised on factors not relevant to a determination of disability within the meaning of the Social Security Act. The Court finds the ALJ's reliance on the

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[4] The ALJ incorrectly added that "after the kidney stone was taken care of, the claimant's physical therapist noted improvement in ability." (R. 20) The record does not support this statement. However, the mistake is of no consequence to the substantiality of the evidence or even to the point being advanced by the ALJ. Dr. Martin's examination of claimant was on April 5, 1994. (R. 170-172) The first record of kidney stone problems was claimant's visit to the emergency room at Cushing Regional Hospital on May 30, 1994. These dates are close enough to support the ALJ's questioning of whether claimant's pain had been misidentified.

opinion of Dr. Robertson and rejection of the opinions of Drs. Martin and Harper, to the extent they disagreed with Dr. Robertson, to be proper and supported by substantial evidence.

C. ***Impairment of the Hand and Elbow***

Nor did the ALJ err in failing to find that claimant's RFC was diminished by an impairment of claimant's right hand and elbow. It is well settled that the claimant bears the burden of proving disability. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). Claimant did not mention any impairment in his hand or elbow until his first examination by Dr. Harper on July 19, 1994. (R. 256-262) In that first evaluation, Dr. Harper noted claimant's prior elbow surgery, but failed to diagnose an impairment associated with claimant's hand or elbow. Id. In a second evaluation of January 23, 1995, Dr. Harper concluded, based on claimant's complaints, that claimant had limited movement in his right elbow, experienced tenderness in that area, and had only a 28 kg grip for his right hand versus a 48 kg grip for the left. (R. 269) At the hearing before the ALJ, claimant said that the pain was the result of surgery in 1985. (R. 51)

The ALJ discussed claimant's claims of impairment of the hand and elbow and determined that any such impairment was not sufficient to diminish claimant's RFC.

> The claimant has complaints of right elbow limitations which was [sic] noted by Dr. Harper in his first examination but did not constitute a part of his assessment. It was not until the second examination, on January 23, 1995, that the claimant had significant complaints of right elbow and arm pain, poor grip, and tenderness of the right lateral epicondyle and over the radial groove and head of the radius, with some limitation of motion of the elbow. Grip was 28kg on the right and 48kg on the left. This translates to 61.6 pounds on the right and 105.6 pounds on the left. Otherwise, there is no evidence of elbow-grip limitations, and the undersigned finds that there are no significant reach/grip limitations.

(R. 21) (citations omitted) Delay and inconsistency in claimant's reporting of impairments may properly be considered by the ALJ. This is particularly true where, as here, the alleged impairment

is based on claimant's subjective complaints. See Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Id. at 517. The determination of the ALJ is supported by substantial evidence.

D. The ALJ's Assessment of Plaintiff's Pain and Credibility

Claimant challenges the ALJ's finding that claimant had the RFC to perform light work subject to certain conditions, specifically alleging that the ALJ erred by not properly considering claimant's pain. The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the court to consider:

> (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995) (internal quotations omitted).

This court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). However, the ALJ's credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. See Kepler, 68 F.3d at 391. Citing Luna, the ALJ extensively discussed his reasons for not believing claimant's assertions of disabling pain. (R. 23-25) These included claimant's failure to seek prescription pain medication,

claimant's lack of motivation, and claimant's statements of disabling pain being inconsistent with his actions and the opinions of his doctors. (R. 24) This court finds that the determination of the ALJ is supported by substantial evidence and specifically and logically connected to that evidence.

E. ***The ALJ's Step Five Determination***

At Step Five of the sequential evaluation process, the burden shifts to the Commissioner to show that a claimant cannot perform work which exists in significant numbers in the national economy. In certain circumstances, the ALJ may rely on the medical-vocational guidelines developed by the Social Security Administration, known as the "grids," to meet this burden. In other instances, the ALJ may only use the grids as a framework for decision-making. Claimant asserts that the ALJ, regarding the period following claimant's reaching the age of 50, "failed to satisfy his Step 5 burden of proof by demonstrating the Claimant has transferable skills to other work." Plaintiff's Brief and Statement of Specific Errors (Docket #23) at 9. The Court disagrees.

First, for a person capable of performing light work, having a limited education, and unskilled or semi-skilled work background, the grids dictate a finding of not disabled, regardless of whether the claimant is a younger individual (age 18-49) or approaching advanced age (age 50-54) or claimant's skills are transferrable or not transferrable. 20 C.F.R. Pt. 404, Subpt. P, App. 2, §§ 202.11, 202.12, 202.18, 202.19. Thus, if the ALJ had relied on the grids, he would not have had to demonstrate that claimant's skills were transferrable.

Second, the ALJ did not conclusively rely on the grids, but only used them as a framework for making his determination. The ALJ consulted a vocational expert, who testified that there were jobs in significant numbers in the national economy for a hypothetical person with claimant's RFC, nonexertional impairments, age, experience, and education. (R. 72-74) Moreover, the vocational

expert testified that claimant had skills which were transferrable to other work. Id. The Court concludes that the ALJ met the burden required of him at the fifth step of the sequential evaluation process.

V. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 14th day of August, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON F. COX,
SSN: 442-62-0828

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-544-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 14th day of August 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON F. COX,
SSN: 442-62-0828

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-544-J

ORDER[2/]

Plaintiff, Sharon F. Cox, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ did not address Plaintiff's mental impairment or attach a PRT, and (2) the ALJ improperly evaluated Plaintiff's credibility. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Leslie S. Hauger (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated August 29, 1995. [R. at 12]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel denied Plaintiff's request for review on April 5, 1997. [R. at 5].

(13)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on December 29, 1956, and was 38 years old at the time of her hearing before the ALJ. [R. at 29]. Plaintiff testified that she completed the eleventh grade but had not obtained a GED. Plaintiff had, however, completed vocational typing and computer classes. [R. at 29-30].

Plaintiff testified that she could not work due to her stomach problems. [R. at 33]. According to her, after she eats her stomach begins cramping, causing severe pain and sometimes results in diarrhea. [R. at 33-35]. Plaintiff testified that her diarrhea sometimes lasts two to three weeks. Plaintiff additionally stated that she has had neck and back pain since her accident in May of 1990. [R. at 35]. According to Plaintiff, at the time of the hearing her back pain was about a four on a scale of one to ten. Plaintiff additionally has headaches and stated that she has them every day. For relief from her headaches Plaintiff takes Excedrin. Plaintiff testified that her headache pain at the time of the hearing was a seven. [R. at 37].

Plaintiff testified that she could lift approximately 20 pounds, stand for approximately 15 minutes, walk for four blocks, and sit for 15 - 30 minutes. [R. at 39]. According to Plaintiff, she straightens up around the house but the person she lives with does the laundry and the shopping. [R. at 38].

Plaintiff stated that her number one problem was her stomach cramps and pain when she ate. [R. at 41].

Plaintiff's average day consists of straightening the house a bit, watching television, napping for approximately 30 minutes, and eating. [R. at 45]. The longest

ride that Plaintiff has taken was for approximately 70 miles. Plaintiff testified that she drives only about ten miles. [R. at 45].

In her disability report dated June 27, 1994, Plaintiff reported that she cooked twice a day, cleaned "off and on all day," was trying to paint, and drove a car. [R. at 106].

Plaintiff was severely injured in an accident at work on May 1, 1990. [R. at 302]. A letter dated May 8, 1990 indicates that Plaintiff progressed rapidly and was discharged from in-patient status on May 4, 1990. [R. at 375]. The letter noted that "barring complications" Plaintiff was expected to return to her usual assembly and grinding duties in mid to late June 1990. [R. at 375]. By letter dated September 7, 1990, Fred C. Le Master, D.O., wrote

> Since discharge from the hospital on 5-4-90 there has been excellant [sic] healing of the lacerations, almost total resolution of the massive heamatoma [sic], no problem reported with the right knee and episodic paresis of the left arm and shoulder which had not seemed to limit the range of motion of the arm nor to decrease the strength.

[R. at 372]. He additionally noted that a CT scan had revealed a non-displaced fracture of the lamina of the fifth cervical vertebra which they determined was consistent with Plaintiff's injury in May of 1990. Dr. Master noted that Plaintiff was being referred to a neurosurgeon and it was anticipated that her disability would be extended for approximately three months and Plaintiff had been instructed not to lift over ten pounds or perform vigorous physical exercise. [R. at 373].

Plaintiff was seen by Consultants Inc. on January 29, 1992 with regard to her May 1990 injury. It was recommended that Plaintiff return to work on February 10, 1992, and be limited to walking one to four hours, sitting one to three hours, and driving one to three hours. Plaintiff's ability to push, pull, and manipulate fine objects was noted as not limited. [R. at 117].

A record from July 30, 1992 indicates Plaintiff was informed to "stop smoking, stop smoking, STOP!!" [R. at 237]. An August 21, 1992 visit records that Plaintiff complained of headaches waking her in the middle of the night and that Plaintiff reported that she either went to sleep or took an aspirin. [R. at 352].

Plaintiff was admitted on October 5, 1992 for peptic ulcer disease and discharged on October 21, 1992. [R. at 121]. The doctor noted that "[s]he continues with neck ache, although not too bad. . . ." [R. at 121]. On discharge Plaintiff was advised not to lift over 25 pounds and to walk as much as possible. [R. at 122].

In completing a patient questionnaire in connection with an October 5, 1992 admission, Plaintiff noted that she "sometimes" had constipation and "sometimes" had diarrhea. [R. at 140]. Plaintiff answered that she did housework in her spare time and that she did exercise. [R. at 141].

Plaintiff was discharged following an endoscopy on November 30, 1992. Plaintiff was instructed to rest for the remainder of the day and resume regular diet and duties the following day. [R. at 177]. The report noted that if Plaintiff continued to have difficulty swallowing she should have an x-ray in one month. On December 29, 1992 a barium swallow indicated no impediment but "somewhat slowed

peristalsis in the distal third of the esophagus with the remainder of the exam unremarkable." [R. at 181]. On December 7, 1992, Plaintiff reported that her swallowing was "okay" and that she could eat better but that if she ate too much "it [would] back up." [R. at 225].

Plaintiff was examined by a social security examiner on October 6, 1994. Plaintiff's chief complaint was "dumping syndrome." Plaintiff informed the examiner that she sometimes had diarrhea two or three times each day. [R. at 192]. Plaintiff's gait was reported as normal and the examiner indicated that Plaintiff had no trouble getting on or off of the exam table. The examiner noted that Plaintiff had chronic lumbar sprain, diarrhea and depression. [R. at 194]. Plaintiffs gross and fine manipulation was normal. [R. at 194].

Visits by Plaintiff to her doctor on May 23, 1994 indicated intermittent diarrhea. A visit on April 1, 1994 indicated that Plaintiff's main problem remained "dumping syndrome." [R. at 211]. Plaintiff refilled her prescriptions on March 28, 1995. [R. at 483]. Plaintiff did not keep her appointment on April 27, 1995. [R. at 483]. On May 3, 1995, Plaintiff complained of pain in her lower front tooth and a lump in her breast. [R. at 484].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

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[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

[5/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ concluded that Plaintiff was not fully credible and could perform sedentary work. The ALJ determined that Plaintiff could not lift overhead, was limited in her ability to walk and stand, but was not limited in her ability to sit. The ALJ found, based on the testimony of a vocational expert, that Plaintiff could perform a significant number of jobs in the national economy.

IV. REVIEW

FULL AND FAIR REVIEW: MENTAL IMPAIRMENT

Plaintiff asserts that the ALJ failed to give Plaintiff a "full and fair review." Plaintiff specifically notes that the ALJ failed to consider Plaintiff's asserted mental impairment despite "repeated references to depression and anxiety in the medical record."

At the hearing before the ALJ, the ALJ asked Plaintiff why she could not work. Plaintiff responded that her main problem was "dumping syndrome," pain, diarrhea, and cramping. Plaintiff additionally noted pain in her knee, neck pain, back pain, and headaches. [R. at 33-38]. Plaintiff did not mention depression. Plaintiff was also examined, at the hearing, by her attorney. She mentioned her cramping, her stomach problems, her neck pain, back pain, and knee pain. Plaintiff did not mention and her attorney did not question her about "depression" or an alleged "mental impairment." [R. at 41-44].

In her "Disability Report" Plaintiff noted that her disabling condition was due to surgery for a two centimeter duodenal ulcer and hiatus hernia, and esophagus surgery. Plaintiff additionally wrote that she had excessive diarrhea after eating. [R. at 103]. Plaintiff did not mention depression or a mental condition. In response to the question "how does your illness or injury affect your ability to care for your personal needs", Plaintiff wrote that "when depressed [she] will not get dressed." [R. at 113]. The record does contain references, in some doctor's notes that Plaintiff "seemed depressed."

Plaintiff suggests that based on the isolated references to depression in the record the ALJ had a duty to investigate Plaintiff's depression, to refer Plaintiff to a consultative examiner, and to prepare a PRT form. The Court disagrees. In this case, Plaintiff was represented at the hearing by an attorney. The attorney could easily have developed the record with respect to the now asserted mental impairment at the hearing before the ALJ, or could have requested, at the hearing, that the ALJ refer Plaintiff for a mental consultative examination. However, no mention of the now alleged mental impairment was made before the ALJ. "When the claimant is represented by counsel at the administrative hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997). Unless counsel specifically identifies an issue as needing further development, "we will not impose a duty on the ALJ to order a consultative examination unless the need for one is clearly established in the record."

Id. at 11. Under the facts of this case, the Court concludes that the ALJ did not err by failing to discuss or further develop a mental disorder.

CREDIBILITY DETERMINATION

Plaintiff additionally asserts that the ALJ's credibility analysis is flawed. Plaintiff states that the ALJ made a conclusory finding that Plaintiff's daily activities were consistent with her sedentary work but that this finding was contradicted by Plaintiff's testimony. Plaintiff also claims that the ALJ improperly concluded that Plaintiff's surgery solved her medical problems and improperly discounted Plaintiff's testimony because Plaintiff did not seek "continuing treatment." According to Plaintiff the ALJ's conclusions are contradicted by the record which indicated that Plaintiff received prescription medication for her condition on a regular basis.

In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987) ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the

possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication."). In addition, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ reviewed the record and Plaintiff's testimony and concluded Plaintiff was not fully credible. The ALJ explained that the record lacked objective findings by treating and examining physicians, that Plaintiff was not taking medication for severe pain, and that Plaintiff did not show discomfort at the administrative hearing. [R. at 17]. The ALJ additionally noted that Plaintiff's treating records did not contain references to Plaintiff's complaints of numerous headaches. With regard to Plaintiff's testimony, the ALJ noted that Plaintiff was not prevented from "performing her activities of daily living." [R. at 18]. The ALJ observed that Plaintiff had had several successful surgeries and that the more recent medical evidence did not indicate continuing complaints of diarrhea or other alleged medical problems. The ALJ further noted that "claimant's credibility is diminished because she has not sought continuing treatment for her headaches, she was not receiving continuing treatment for her gastrointestinal problems and her pain medication is not effective for more than moderate pain control." [R. at 18].

The Court has reviewed the findings of the ALJ and the record and concludes that the ALJ's findings are supported by "substantial evidence."

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 14 day of August 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS RAY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97-C-600-K
	)	
PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, an Indiana corporation	)	
	)	
Defendant.	)	

ORDER

Before the Court is Defendant's Motion for Summary Judgment. Plaintiff has brought this declaratory judgment action, pursuant to 28 U.S.C. § 2201, seeking a declaration of rights and legal obligations under an insurance contract entered between himself and Defendant.

Statement of Facts

Plaintiff Tom Ray applied for automobile insurance from Defendant Prudential Property and Casualty Insurance Company (Prudential) in September of 1996. Plaintiff testified that during the process of obtaining the policy, he asked Prudential's agent, Bruce Chadwick, "Would we be insured driving other vehicles based on our coverage here?" According Plaintiff, Chadwick answered "Sure. That's no problem." Chadwick testified that he could not recall if Plaintiff and his wife specifically asked about non-owned vehicles. Plaintiff testified that he believed, based on Chadwick's statement, that all of the insureds would be covered even while operating a vehicle not listed in the policy.

Ultimately, Prudential issued a policy to Plaintiff listing Plaintiff, his wife, Joann Ray, and his daughters, Shelly McCoy and Amanda Bundy, as the insureds. The policy also listed several

vehicles which were covered: a Mazda 323, an Eagle Talon, a Ford Aerostar van, a Ford Escort, and a Hyundai. The policy included provisions which set out losses Prudential would not pay, addressed coverage for non-owned cars, and defined terms used throughout the policy. The pertinent policy provisions stated:

> Cars Owned by Household Residents
> We will not pay for bodily injury or property damage caused by anyone using a car not insured under this part, owned by you or a household resident.
>
> Regularly Used Non-Owned Cars
> We will not pay for bodily injury or property damage caused by you or a household resident using a non-owned car not insured under this part, regularly used by you or a household resident.
>
> Substitute Cars
> If a car covered under this part breaks down, is being serviced or repaired, or is stolen or destroyed, we will cover a car you borrow temporarily (with the owner's permission) while your car is being repaired or replaced. This car cannot be owned by you or a household resident....
>
> Other Non-Owned Cars
> In addition to SUBSTITUTE CARS, we will cover a non-owned car. The owner must give permission to use it. The non-owned car must be used in the same way as intended by the owner...the non-owned car has the same coverage as any one of your cars insured with us.
>
> Household Resident
> A household resident is someone who lives in your household. A household resident includes a resident relative.
>
> Non-Owned Car
> A non-owned car is a car which is not owned by, registered in the name of or furnished or available for the regular or frequent use of you or a household resident.
>
> Resident Relative
> A resident relative is someone who lives in your household and is related to you by blood, marriage, adoption or is a ward or foster child.

At the time Prudential issued the policy, Amanda Bundy and her husband, David Bundy, lived part-time with Ray. Amanda and David Bundy continued to live with Ray until sometime after October 15, 1996. The policy covered neither David Bundy nor his Isuzu pickup truck.

On October 15, 1996, Amanda Bundy was involved in an automobile accident while driving David Bundy's truck. Amanda Bundy struck Mary Greene, a pedestrian, with the truck. David Bundy had no insurance on the truck. Greene sued Amanda Bundy in District Court for Ottawa County for injuries allegedly caused by the accident. Prudential denied a claim, made under Ray's policy, to pay for the injuries to Greene allegedly caused by Amanda Bundy. Plaintiff instituted this suit seeking a declaration that Prudential is obligated to pay for Greene's injuries under Tom Ray's policy.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business*

Machines, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

Defendant argues that summary judgment is appropriate because the policy clearly denies coverage for Amanda Bundy while driving a vehicle not listed on the policy, but owned by a household resident. Plaintiff argues that a question of fact exists as to whether the Court should reform the policy to delete the "Cars Owned By a Household Resident" provision because of constructive fraud by Prudential.

Initially, the Court must determine whether Plaintiff's policy covers Amanda Bundy's accident with Mary Greene. Courts interpret the language of insurance policies in their plain and ordinary sense if the policies are clear and unambiguous. *See e.g. Littlefield v. State Farm Fire and Cas.*, 857 P.2d 65, 69 (Okla. 1993); *Dobson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). Courts interpret insurance contracts and determine whether they are ambiguous as a matter of law. *See e.g. Max True Plastering Co. v. United States Fidelity and Guar. Co.*, 912 P.2d 861, 868 (1996); *Dobson*, 812 P.2d at 376. Insurance contracts are only ambiguous if they are susceptible to two constructions. *See Max True*, 912 P.2d at 869; *Littlefield*, 857 P.2d at 69. The Oklahoma Supreme Court has admonished courts not to indulge in forced or strained constructions to create and then construe ambiguities. *See Max True*, 912 P.2d at 869; *Dobson*, 812 P.2d 376.

Here, the "Cars Owned By Household Residents" provision of the policy denies coverage for "bodily injury caused ...by anyone using a car not insured under the policy which is owned by the insured or a household resident." The policy defined a household resident as someone who lived in the household. The definition of household resident includes resident relatives, which the policy defined as someone who lives in the insured's household and is related by blood, marriage, adoption,

or is a war child or foster child.

The Court finds that the relevant policy provisions are not susceptible to multiple meanings and are not ambiguous. Because the relevant provisions are clear and unambiguous, the Court considers their plain and ordinary meanings. Amanda Bundy was driving David Bundy's pickup truck when the accident with Mary Greene occurred. The pickup truck was not covered under Ray's insurance policy. At the time of the accident, David Bundy lived with Ray and was both a household resident and a resident relative of Ray. This situation clearly falls under the "Cars Owned by Household Residents" provision of the policy. Prudential acted in accord with the policy when it denied the claim arising from Amanda Bundy's accident with Greene.

Plaintiff does not contest that the policy, as written, denies coverage for the accident between Bundy and Greene. Instead, Plaintiff argues that an issue of fact exists as to whether the insurance policy should be reformed to delete the "Cars Owned By Household Residents" provision, upon which Defendant relies, because of constructive fraud. Plaintiff seemingly contends that a fact-finder could find constructive fraud on two grounds. First, Plaintiff argues that Prudential had a duty, which it breached, to inform him of the provision because he sought a policy which would provide coverage for the listed insureds while driving unlisted vehicles. Second, Plaintiff argues that he was mislead by Chadwick, Prudential's agent, when Chadwick told him that it would be no problem providing coverage for the listed insureds while driving unlisted cars.

Plaintiff failed to allege fraud in his complaint as required by Federal Rule of Civil Procedure 9(b).[1] Plaintiff first raised constructive fraud in his response brief to Defendant's brief in support

[1]At the Pretrial Conference, the Court denied Plaintiff's Application to File Second Amended Complaint.

of the motion for summary judgment. Because Plaintiff has not properly pled fraud in accordance with Rule 9(b), Plaintiff's constructive fraud claim is not properly before the Court and does not provide a basis to defeat summary judgment.

Plaintiff's constructive fraud claim would fail on the merits if it were properly before the Court. Plaintiff relies on *Gentry v. American Motorist Ins. Co.*, 867 P.2d 468 (Okla. 1994), to support its constructive fraud and reformation argument. The *Gentry* decision revolved around situations where the insurer and the insured mutually agree on coverage, but the insurer subsequently issues a policy which does not conform to the mutual agreement. *Gentry*, 867 P.2d at 471-2 (citing *Pacific Nat'l Fire Ins. Co. v. Smith Bros. Drilling Co.*, 162 P.2d 871 (Okla. 1945); *Ohio Cas. Ins. Co. v. Callaway*, 134 F.2d 788 (10th Cir. 1943). The situation in this case is different. First, there is no evidence that Prudential ever agreed that listed insureds would be covered while driving unlisted cars owned by household residents. Second, Prudential did not mislead or deceive Plaintiff. Plaintiff bases his belief of coverage while driving unlisted cars on Chadwick's "Sure, that's no problem," response to Ray's question on whether the listed insureds would be covered while driving other vehicles. Significantly, Ray testified that he asked whether he and the other listed insureds would be covered while driving other cars. He did not ask whether they would be covered while driving all other cars or while driving unlisted cars owned by household residents. Prudential subsequently issued a policy which did cover the listed insureds while driving cars not listed on the policy. Specifically, the "Substitute Cars" and "Other Non-Owned Cars" provisions provide such coverage. Plaintiff has offered no evidence establishing a mutual agreement for coverage of the insureds while driving unlisted cars owned by household residents. Prudential did not mislead or deceive Plaintiff because it issued a policy which conformed with Chadwick's response to Ray's

only question on the coverage of insureds driving unlisted cars.[2]

Conclusion

Summary judgment is appropriate in this case. Prudential complied with the insurance policy when it denied the claim for Amanda Bundy's accident with Mary Greene. Plaintiff's constructive fraud claim is not properly before the Court because of Plaintiff's failure to comply with Federal Rule of Civil Procedure 9(b). The constructive fraud claim would have failed on the merits if it were properly before the Court. The Court GRANTS Defendant's Motion for Summary Judgment.

ORDERED this 14 day of August, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

[2] Additionally, Plaintiff incorrectly asserts that there was general coverage for non-owned cars which was subsequently excluded by the "Cars Owned by Household Resident" provision. While the "Other Non-owned Cars" provision does state that coverage is provided for non-owned cars, the policy clearly defined non-owned cars to exclude cars owned by household residents. The policy defined a non-owned car as "a car which is not owned by, registered in the name of or furnished or available for the regular or frequent use of you or a household resident." Because David Bundy was a household resident and he owned the pickup truck involved in the accident, the pickup truck would not be considered a non-owned vehicle under the policy. Contrary to Plaintiff's assertion, the non-owned car provision would not have provided coverage for Amanda Bundy while driving David Bundy's pickup truck, absent the "Cars Owned By Household Residents" provision.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SUSAN ADAMS,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE AUG 14 1998
	)	
vs.	)	Case No. 94-C-1046-H
	)	
AMERICAN AIRLINES, INC.	)	
	)	
Defendant.	)	

FILED
AUG 13 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This Court having entered Judgment for costs taxed in the amount of $27,199.43 in the above referenced matter on May 26, 1998 and having heard oral arguments on Plaintiff's Application for *De Novo* Review or Alternatively, Application to Stay Enforcement (the "Application") on this day, denies the Application and enters judgment for costs for the amount taxed by the Clerk ($27,199.43) less the following adjustments:

Saylor Deposition Costs	$828.48
Copy costs associated with Renewed Motion for Summary Judgment	42.90
TOTAL	$871.38

Costs of $871.38 should be deducted from said Judgment entered in the amount of $27,199.43 for a new judgment amount of $26,328.05.

Judgment is therefore entered on behalf of Defendant, American Airlines, Inc., and against the Plaintiff, Susan Adams, in the amount of $26,328.05.

Dated this 12TH day of August, 1998.

SVEN ERIK HOLMES
Judge for the United States District
Court for the Northern District of
Oklahoma

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

THOMAS B. KRAUSER
aka Thomas Brian Krauser;
BARBARA A. KRAUSER
aka Barbara Alice Krauser;
FARM CREDIT BANK OF WICHITA;
AMERICAN EXCHANGE BANK,
Collinsville, Oklahoma;
COUNTY TREASURER, Mayes County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Mayes County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE AUG 14 1998

FILED
AUG 13 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 98-CV-0076-H (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day of August, 1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; that the Defendant, American Exchange Bank, Collinsville, Oklahoma, now known as RCB Bank, appears not, having previously filed its Disclaimer; that the Defendants, Thomas B. Krauser aka Thomas Brian Krauser, Barbara A. Krauser aka Barbara Alice Krauser and Farm Credit Bank of Wichita, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Thomas B. Krauser aka Thomas Brian Krauser, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on April 16, 1998; that the Defendant, Barbara A. Krauser aka Barbara Alice Krauser, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on April 14, 1998; that the Defendant, Farm Credit Bank of Wichita, executed a Waiver of Service of Summons on February 6, 1998 through John Lann, Assistant General Counsel; and that the Defendant, American Exchange Bank, Collinsville, Oklahoma, now known as RCB Bank, executed a Waiver of Service of Summons on February 9, 1998 through attorney Richard D. Mosier.

It appears that the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, filed their Answer on February 26, 1998; that the Defendant, American Exchange Bank, Collinsville, Oklahoma nka RCB Bank, filed its Disclaimer on February 26, 1998; that the Defendants, Thomas B. Krauser aka Thomas Brian Krauser, Barbara A. Krauser aka Barbara Alice Krauser and Farm Credit Bank of Wichita, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages upon the following described real property located in Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The South Half of Lot 4 and the Southwest Quarter of the Northwest Quarter and the West Half of the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter and the West Half of the Northeast Quarter of the Southwest Quarter and the Northeast Quarter of the Southwest Quarter of the Southwest Quarter

of Section 1, Township 23 North, Range 20 East of Indian Base and Meridian, less the following described property, to-wit:
All those parts of the Northeast Quarter of the Southwest Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter and the West Half of the Northeast Quarter of the Southwest Quarter and the West Half of the Southeast Quarter of the Northwest Quarter described as follows:
Beginning at a point in the West boundary of said Northeast Quarter Southwest Quarter Southwest Quarter 250 feet South of the Northwest corner thereof;
thence in a Northeasterly direction to a point in the East boundary of said Northwest Quarter of the Southwest Quarter 660 feet South of the Northeast corner thereof;
thence in a Northeasterly direction to a point in the North boundary of said West Half of the Northeast Quarter of the Southwest Quarter 330 feet East of the Northwest corner thereof;
thence in a Northeasterly direction to a point in said West Half of the Southeast Quarter of the Northwest Quarter 660 feet South and 165 feet West of the Northeast corner thereof;
thence in a Northwesterly direction to a point in the North boundary of said West Half of the Southeast Quarter of the Northwest Quarter 330 feet West of the Northeast corner thereof;
thence Easterly along said North boundary to said Northeast corner;
thence Southerly along the East boundary of said West Half of the Southeast Quarter of the Northwest Quarter to the Southeast corner thereof;
thence in a Southwesterly direction to a point in the West boundary of said West Half of the Northeast Quarter of the Southwest Quarter 165 feet North of the Southwest corner thereof;
thence in a Southwesterly direction to a point in the West boundary of said Northeast Quarter of the Southwest Quarter of the Southwest Quarter 100 feet North of the Southwest corner thereof;
thence Northerly along said West boundary to the point of beginning;
and all that part of the South 20 acres of Lot 4 lying North of the following described line:
Beginning at the Northwest corner of said South 20 acres of Lot 4;
thence in a Southeasterly direction to a point in the East boundary of said South 20 acres of Lot 4 330 feet South of the Northeast corner thereof, all in Section 1, Township 23 North, Range 20 East of Indian Base and Meridian,
and
The South Half of Lot 1 and the Southeast Quarter of the Northeast Quarter and the South Half of the South Half of the Southwest Quarter of the Northeast Quarter and the North Half of the Southeast Quarter and the Northeast Quarter of the Northeast Quarter of the Southwest Quarter of Section 2, Township 23 North, Range 20 East of Indian Base and Meridian.

The Court further finds that Thomas B. Krauser and Barbara A. Krauser executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following promissory notes.

Instrument	Amount	Date	Interest Rate
Original Note	$ 36,500.00	06/12/80	11.00%
Subsequent Loan	40,500.00	03/29/82	16.00%
Rescheduled Note	46,172.78	03/11/83	13.50%
Rescheduled Note	54,472.49	07/10/84	12.50%
Rescheduled Note	58,446.00	02/08/85	12.50%
Current Note	52,284.68	05/15/89	11.00%
Original Note	$124,000.00	05/26/83	10.75%
Reamortized Note	138,973.42	07/10/84	10.75%
Reamortized Note	147,691.63	02/08/85	5.25%
Current Note	177,899.64	05/15/89	5.00%

The Court further finds that as security for the payment of the above-described notes, Thomas B. Krauser and Barbara A. Krauser executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following real estate mortgages.

Instrument	Dated	Filed	County	Book	Page
Real Estate Mortgage	06/12/80	06/17/80	Mayes	579	316
Real Estate Mortgage	03/27/81	03/27/81	Mayes	587	410
Real Estate Mortgage	05/26/83	05/26/83	Mayes	611	643
Real Estate Mortgage	07/10/84	07/10/84	Mayes	629	793
Real Estate Mortgage	08/14/84	08/14/84	Mayes	631	685
Real Estate Mortgage	06/11/85	06/11/85	Mayes	644	549
Real Estate Mortgage	05/15/89	05/18/89	Mayes	701	226

These mortgages cover the above-described property, situated in the State of Oklahoma, Mayes County.

The Court further finds that due to a scrivener's error all of the real estate mortgages described above except the mortgage dated June 12, 1980, contain an error in the following portion of the legal description:

> thence in a Southwesterly direction to a point in the West boundary of said Northeast Quarter of the Southwest Quarter of the Southwest Quarter 100 feet North to the Southwest corner thereof;

The shadowed word to should read of. The Court finds that the legal descriptions in all the mortgages should be conformed to the legal description as stated in the mortgage dated June 12, 1980, and recorded on June 17, 1980 in Book 579, Page 316, in Mayes County, Oklahoma..

The Court further finds that as collateral security for the payment of the above-described notes, Thomas B. Krauser and Barbara A. Krauser executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following financing statements and security agreements thereby creating in favor of the Farmers Home Administration, now known as Farm Service Agency, a security interest in certain crops, livestock, farm machinery and motor vehicles described therein.

Instrument	Dated	Filed	County	File Number
Financing Stmt.		02/26/80	Mayes	246771
Continuation Stmt.		08/17/84	Mayes	264262
Continuation Stmt.		12/15/89	Mayes	279618
Continuation Stmt.		08/26/94	Mayes	246771-C
Security Agreement	02/26/80			

Instrument	Dated	Filed	County	File Number
Security Agreement	03/25/81			
Security Agreement	03/29/82			
Security Agreement	03/29/83			
Security Agreement	04/11/84			
Security Agreement	03/22/85			
Security Agreement	03/14/86			
Security Agreement	04/08/87			
Security Agreement	03/10/88			
Security Agreement	03/01/89			
Security Agreement	04/04/90			
Security Agreement	05/10/91			
Security Agreement	10/06/93			
Security Agreement	06/30/94			

The Court further finds that Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, made default under the terms of the aforesaid notes, mortgages and security agreements by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes, mortgages and security agreements, after full credit for all payments made, the principal sum of $230,393.35, plus accrued interest in the amount of $82,023.70 as of September 10, 1997, plus interest accruing thereafter at the rate of $40.3584 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $12.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $1,934.20, plus penalties and interest, for the year 1997. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, American Exchange Bank, Collinsville, Oklahoma nka RCB Bank, disclaims any right, title or interest in the subject real property which is the subject matter of this action.

The Court further finds that the Defendants, Thomas B. Krauser aka Thomas Brian Krauser, Barbara A. Krauser aka Barbara Alice Krauser and Farm Credit Bank of Wichita, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated June 10, 1996, and recorded on June 17, 1996 in the records of the Mayes County Clerk, Mayes County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to Farm Service Agency, formerly Farmers Home Administration.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, have and recover judgment against Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, in the

principal sum of $230,393.35, plus accrued interest in the amount of $82,023.70 as of September 10, 1997, plus interest accruing thereafter at the rate of $40.3584 per day until judgment, plus interest thereafter at the current legal rate of 5.438 percent per annum until fully paid, plus the costs of this action in the amount of $12.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all the legal descriptions in all the mortgages are conformed to the legal description as stated in mortgage dated June 12, 1980, and recorded on June 17, 1980 in Book 579, Page 316 in Mayes County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, have and recover judgment in the amount of $1,934.20 plus penalties and interest by virtue of 1997 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Thomas B. Krauser aka Thomas Brian Krauser, Barbara A. Krauser aka Barbara Alice Krauser, Farm Credit Bank of Wichita and American Exchange Bank, Collinsville, Oklahoma nka RCB Bank, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma,

commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
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Tulsa, Oklahoma 74103
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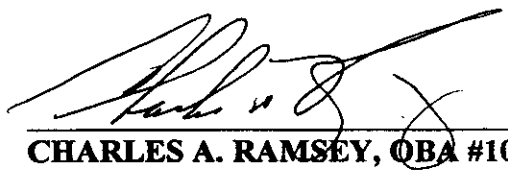

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County Treasurer and
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Judgment of Foreclosure
Case No. 98-CV-0076-H (J) (Krauser)

PP:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANITA HENDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-C-1052-H
	)	
WHIRLPOOL CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on a motion for summary judgment (Docket # 21) by Defendant Whirlpool Corporation ("Whirlpool").

Plaintiff has alleged the following claims against Whirlpool: (1) sexual harassment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.; (2) wrongful discharge in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq.; and (3) intentional infliction of emotional distress.[1] Defendant has moved for summary judgment on all of these claims. A hearing was held in this matter on August 6, 1998.

I

For purposes of this motion, the Court accepts as true the following facts agreed to by the parties:

[1] The Court previously granted Whirlpool's motion to dismiss Plaintiff's claim for discharge in violation of Oklahoma public policy. Further, in her response to Whirlpool's motion for summary judgment and at the hearing in this matter, Plaintiff did not contest Whirlpool's motion for summary judgment on Plaintiff's Title VII retaliation claim. Accordingly, Whirlpool's motion for summary judgment as to this claim has been confessed and is hereby granted.

1. Whirlpool has in place a written policy prohibiting any form of harassment or abusive conduct directed at employees because of their race, color, sex, religion, national origin, age, or other legally protected status.

2. Whirlpool's policy provides that any employee who feels subjected to harassing behavior should immediately report it to any Business Team Trainer, Staff Member, or Human Resources Representative.

3. During the first two weeks of employment, Whirlpool employees receive training in the areas of safety, human resources policy and procedure, quality, teaming skills, benefits, and practical on-the-job experience. Specifically, employees receive training regarding Whirlpool's policies against harassment and discrimination in the workplace.

4. Whirlpool's written sexual harassment complaint procedure indicates that reports of discrimination and/or harassing conduct are investigated.

5. Whirlpool maintains a 12 credit attendance policy. If an employee uses all 12 credits, that employee is terminated for excessive absenteeism.

6. Whirlpool has a written attendance policy. Whirlpool also issued written materials that contain hypothetical scenarios explaining that FMLA leave is not counted as an absence under the attendance policy.

7. Plaintiff began her employment with Whirlpool on June 3, 1996 as a technician assigned to the door team on the electric non-pyro line. Plaintiff was transferred to the position of auditor at the beginning of May 1997.

8. Plaintiff signed an Acknowledgment of Receipt on June 4, 1996 acknowledging her receipt of the Human Resources Guide that sets forth Whirlpool's policies.

9. Plaintiff complains of two instances of inappropriate touching by her co-worker, Henry Johnson. Specifically, Plaintiff claims that on May 14, 1997, Mr. Johnson passed a drawer underneath Plaintiff's arm and touched her breast. In addition, Plaintiff claims that on May 15, 1997, Mr. Johnson "came up behind her and grabbed her beneath her breasts in the high rib area" and held her for several seconds.

10. Plaintiff further claims that Mr. Johnson assaulted her when he "had his hands up and out at [her] with his back hunched over" as they approached each other in a hallway.

11. Plaintiff also complains that Mr. Johnson told her a joke she found offensive, which the parties refer to as the "lesbian joke," and that he had made offensive remarks to another female employee.

12. Plaintiff reported the incidents to Whirlpool management officials. Management officials in the Whirlpool Human Resources Department immediately met with Mr. Johnson, who denied the inappropriate touching. Both parties reported that there were no witnesses who could corroborate their story. There had been no prior complaints concerning Mr. Johnson.

13. Management officials counseled Mr. Johnson regarding Whirlpool's sexual harassment policy and directed Mr. Johnson to leave Plaintiff alone. Plaintiff was informed of management's discussion with Mr. Johnson and was told that if there were any further incidents Plaintiff should immediately advise management.

14. After being informed of the decision, Plaintiff demanded that either she or Mr. Johnson be transferred. Whirlpool refused to transfer either employee.

15. After the investigation, Mr. Johnson did not attempt to touch her, and only spoke to Plaintiff on one occasion to respond to a business-related question. Also following the investigation, Plaintiff's supervisor, on at least one occasion, asked Plaintiff how things were going between Plaintiff and Mr. Johnson. Plaintiff told her supervisor that everything was fine and made no further complaints to any member of management.

16. Following the complaint to management, Plaintiff's salary and benefits remained the same.

17. Plaintiff was terminated on August 18, 1997. Whirlpool told Plaintiff that she was being fired for excessive absenteeism in accordance with the attendance policy.

18. Plaintiff took a medical leave of absence from March 31, 997 through April 22, 1997. Plaintiff took a second medical leave of absence in July 1997.

Whirlpool has moved for summary judgment based on the above undisputed facts.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a

"genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

Defendant has first moved for summary judgment on Plaintiff's claim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Section 703(a) of Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). Defendant has moved for summary judgment, claiming that the alleged conduct does not rise to a level that is severe or pervasive and that Defendant is not liable for any alleged sexual harassment because it took reasonable measures to remedy any harassment.

A

The prohibition against discrimination because of sex prohibits sexual harassment based upon a "hostile work environment."[2] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Sexual harassment occurs where the "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id. The conduct must further "be sufficiently severe or

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[2] Recently, the United States Supreme Court eliminated in large part the substantive distinction between "quid pro quo" sexual harassment claims and sexual harassment claims based upon a "hostile work environment." The Supreme Court stated that the distinction might be relevant to the initial question of whether a plaintiff can prove discrimination in violation of Title VII. "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2265 (1998). Accordingly, although the Court may characterize Plaintiff's claim as one based upon a hostile work environment, this characterization is meaningful only to the extent that Plaintiff must demonstrate that the alleged sexually harassing conduct was severe or pervasive.

pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

To be actionable under Title VII, the sexually objectionable environment must be both objectively and subjectively perceived as hostile or abusive, based on the totality of the circumstances. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993). In making this determination, courts must consider the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. The Supreme Court has also recently explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998, 1003 (1998), and that Title VII must not become a "general civility code." Id. at 1002.

Whirlpool claims that the alleged conduct is not severe or pervasive since a reasonable person would not find that Mr. Johnson's actions created a hostile work environment. Specifically, Whirlpool states that Plaintiff can present no evidence that the first touching incident was any more than an accidental touching of Plaintiff's breast. As to the second touching incident, Plaintiff can present no evidence that the touching was anything more than nonsexual horseplay. Whirlpool also alleges that offensive jokes told to Plaintiff's coworkers outside of her presence cannot contribute to creating a hostile work environment.

In contrast, Plaintiff claims that a hostile work environment was created by the two incidents of touching, the assault in the hallway, and the offensive joke. Plaintiff also alleges that after she complained to management, Mr. Johnson "constantly glared and stared" at Plaintiff and

that other coworkers "shunned and rumor mongered" about Plaintiff. Pl.'s Resp. at 21. Plaintiff asserts that her work performance was affected by this conduct and that she was embarrassed and humiliated by Mr. Johnson's allegedly abusive behavior. Moreover, she claims that other sexual jokes that Mr. Johnson told in the workplace contributed to the sexually harassing environment.

The Court finds that there are disputed issues of material fact as to whether the alleged conduct was so severe or pervasive as to create a hostile work environment. Although Whirlpool contends that Plaintiff cannot prove that the touching incidents were not accidents or horseplay, a determination as to the nature of the touching, and whether such touching occurred at all, largely depends upon the credibility of Plaintiff and Mr. Johnson, especially since there are no witnesses to either of these two incidents. See Sauers v. Salt Lake County, 1 F.3d 1122, 1126 (10th Cir. 1993) (stating that determining whether conduct is unwelcome "turns largely on credibility determinations committed to the trier of fact") (quoting Meritor, 477 U.S. at 68).

The Court also notes that harassment of other women in the workplace may be considered in evaluating a claim of a sexually harassing work environment. Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 782 (10th Cir. 1995). Moreover, "threatening stares" taken as a result of complaints about sexual harassment can also constitute illegal sexual harassment, if the stares are "sufficiently related" to prior sexual harassment. Id. at 784 n.3.[3] Thus, considering Plaintiff's allegations of touching, stares, offensive jokes, and harassment of other women in the workplace, the Court concludes that there is a reasonable basis upon which a finder of fact could

[3] The Court notes that "stares" directed at an employee who has reported instances of sexual harassment might, in certain circumstances, also be conduct sufficient to form the basis of a retaliation claim.

find that Plaintiff was subjected to a hostile work environment. Accordingly, Defendant's motion for summary judgment on this basis is hereby denied.

B

Employers may be liable on a claim of sexual harassment by a coworker for "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 (10th Cir. 1990); see also 29 C.F.R. § 1604.11(d) (stating that "[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."). In this situation, "courts must make two inquiries: first, into the employer's actual or constructive knowledge of the harassment, and second, into the adequacy of the employer's remedial and preventive responses to any actually or constructively known harassment." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998).[4]

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[4] In a supplemental brief, Plaintiff argues that the standards for employer liability recently enunciated by the Supreme Court in Burlington Indus. and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) apply in the instant case. In those cases, the Supreme Court held that employers are vicariously liable for sexual harassment "by a supervisor" when a tangible employment action, such as discharge, demotion, or undesirable reassignment, is taken. When no tangible employment action is taken, employers may raise an affirmative defense consisting of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S. Ct. at 2293; Burlington Indus., 118 S. Ct. at 2270.

The Court finds that the standard for employer liability enunciated in Faragher and Burlington Indus. is inapplicable to the instant case since the alleged sexual harassment is by a coworker. In articulating the standard, the Supreme Court specifically stated that this standard is

In determining the first question of an employer's actual knowledge, the reporting of harassment to management-level employees is sufficient. Id. Further, if a plaintiff points to specific facts which would indicate that harassment by coworkers is widely pervasive, such facts could support an inference of constructive knowledge by the employer. Id. at 675.

Whirlpool does not dispute that Plaintiff complained to management officials about the two touching incidents, the alleged "assault" incident in the hallway, and the offensive joke. In turn, Plaintiff does not dispute that she did not notify management of any alleged threatening stares and "rumors" by other coworkers, but contends that she did not notify management of these actions because she had no confidence in management after their earlier disciplinary actions toward Mr. Johnson.

The Court finds that Whirlpool had actual knowledge of the conduct that Plaintiff reported to management. The Court does not find, however, that Whirlpool had constructive knowledge of any "rumors" or "stares." There is no evidence in the record that the alleged conduct Plaintiff did not report to management was so pervasive as to render Whirlpool culpable for failing to discover it. Accordingly, the Court proceeds to analyze Whirlpool's response based upon the incidents of which Whirlpool had actual knowledge.

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for a hostile environment created "by a supervisor." Further, both cases recognized the reasons for not holding an employer vicariously liable for the actions of a coworker to the same extent as for a supervisor. Faragher, 118 S. Ct. at 2291-92; Burlington Indus., 118 S. Ct. at 2269. Accordingly, the Court will continue to apply the standards previously discussed when the sexual harassment is perpetrated by a coworker, rather than by a supervisor.

In addressing the second question for employer liability, whether the employer's response was adequate, the Tenth Circuit has held that courts must ask "whether the remedial and preventative action was 'reasonably calculated to end the harassment.'" Adler, 144 F.3d at 676 (quoting Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991)). In answering this question, the Tenth Circuit recently stated the following:

> A stoppage of harassment shows effectiveness, which in turn evidences such reasonable calculation. However, this is not the sole factor to be considered. Because there is no strict liability and an employer must only respond reasonably, a response may be so calculated even though the perpetrator might persist.
>
> In cases where effectiveness is not readily evidenced by a stoppage, we consider the timeliness of the plaintiff's complaint, whether the employer unduly delayed, and whether the response was proportional to the seriousness and frequency of the harassment. Courts have explained that simply indicating to a perpetrator the existence of a policy against harassment is usually insufficient. By way of example, responses that have been held reasonable have often included prompt investigation of the allegations, proactive solicitation of complaints, scheduling changes and transfers, oral or written warnings to refrain from harassing conduct, reprimands, and warnings that future misconduct could result in progressive discipline, including suspension and termination.
>
> The employer is, of course, obliged to respond to any repeat conduct; and whether the next employer response is reasonable may very well depend upon whether the employer progressively stiffens its discipline, or vainly hopes that no response, or the same response as before, will be effective. Repeat conduct may show the unreasonableness of prior responses. On the other hand, an employer is not liable, although a perpetrator persists, so long as each response was reasonable. It follows that an employer is not required to terminate a perpetrator except where termination is the only response that would be reasonably calculated to the end the harassment.
>
> Unfortunately, some harassers may simply never change. Just as unfortunate, a victim may have to suffer repeated harassment while an employer progressively disciplines the perpetrator to determine whether he or she is just such a "hard head" case. It is some consolation for the victim that, to be reasonable, responses must progress more rapidly in proportion to more serious and frequent harassment. The courts, however, must balance the victim's rights, the employer's rights, and the alleged harasser's rights. If our rule were to call for

> excessive discipline, employers would inevitably face claims from the other direction of violations of due process rights and wrongful termination.

Adler, 144 F.3d at 676-77 (citations omitted). Further, the Court notes that the reasonableness of an employer's response may be measured by whether other potential harassers are deterred. In this regard, however, the Tenth Circuit requires that there be a nexus between an employer response and subsequent harassment by others. Without this nexus, the later harassment is irrelevant as to whether the employer's response in the first instance was reasonable. Id. at 678.

Whirlpool contends that its response to Plaintiff's complaint was reasonable since Mr. Johnson was counseled regarding Whirlpool's sexual harassment policy and was directed to leave Plaintiff alone. Whirlpool further contends that its response was adequate since Plaintiff's contact with Mr. Johnson was minimized, Plaintiff did not make any further complaints regarding Mr. Johnson, and Plaintiff's supervisor followed up by asking Plaintiff whether she was having any further problems with Mr. Johnson. Whirlpool also contends that its investigation in the matter was reasonable since Plaintiff did not indicate that there were any witnesses to the alleged misconduct.

Plaintiff asserts that Whirlpool's response was not adequate since Whirlpool refused to transfer either Plaintiff or Mr. Johnson from the department and Whirlpool management did not ask other team members about the allegations of misconduct. Plaintiff further asserts that Whirlpool's response was inadequate since it failed "to eliminate [all the] vestiges of the discriminatory environment" by failing to discipline Mr. Johnson and for its failure to make Plaintiff whole by offering her psychotherapy or time off to recover. Pl.'s Resp. at 27.

The Court finds that, as a matter of law, Whirlpool's response to Plaintiff's complaint was adequate and reasonable. Whirlpool counseled Mr. Johnson on Whirlpool's sexual harassment policy and directed Mr. Johnson to leave Plaintiff alone. Whirlpool pursued the situation by later asking Plaintiff about the relationship between her and Mr. Johnson. Plaintiff also agrees that contact between the two was minimized and that communication with Mr. Johnson effectively ceased. Without evidence of additional harassment or more severe or frequent misconduct, Whirlpool was not required to terminate or transfer Mr. Johnson or Plaintiff immediately.

Although Plaintiff asserts that there occurred stares by Mr. Johnson and harassment by other coworkers, Plaintiff did not complain to management about this alleged conduct. In this regard, as in Adler, Plaintiff has not presented evidence of a nexus between Whirlpool's earlier response and the later actions by others that would question the adequacy of Whirlpool's initial reaction. Thus, without subsequent notification of misconduct by Plaintiff and without evidence of a nexus between Whirlpool's response and any continued harassment, the alleged stares and rumors do not render Whirlpool's response infirm.

The Court also finds that Whirlpool's investigation into the matter, although not dispositive as to the adequacy of the response, was reasonable. When asked if there were witnesses to the alleged conduct, Plaintiff stated that there were none. Further, since Plaintiff made no further complaints after the initial counseling of Mr. Johnson and since Whirlpool was not aware of further instances of harassment, a full-scale investigation into the conduct of Mr. Johnson was not warranted. Accordingly, the Court finds that Whirlpool's response was proportional and reasonable, considering the nature and frequency of the alleged conduct, and

was reasonably calculated to end any harassment. Defendant's motion for summary judgment on Plaintiff's sexual harassment claim is hereby granted.

III

Defendant has next moved for summary judgment on Plaintiff's FMLA claim. The FMLA provides a private right of action by employees for violations of the statute. 29 U.S.C. § 2617(a)(2). In order for an "eligible employee" to establish liability by an "employer," as both terms are defined by the FMLA, 29 U.S.C. § 2611(2) & (4), the employee must establish (1) entitlement to leave as defined by 29 U.S.C. § 2612(a)(1), and (2) that such entitlement to leave was interfered with by the employer in violation of 29 U.S.C. § 2615. In response, an employer may assert as affirmative defenses that (1) the plaintiff failed to provide the notice required by the FMLA and the regulations promulgated by the Department of Labor, 29 U.S.C. § 2612(e)(1) (applying to foreseeable leave only); 29 C.F.R. § 825.303 (applying to unforeseeable leave); and/or (2) the plaintiff failed to provide sufficient "certification issued by the health care provider," if and to the extent certification was required by the employer in the particular case, 29 U.S.C. § 2613; 29 C.F.R. §§ 825.305-308.

In the instant case, the parties do not dispute that both Plaintiff and Whirlpool are covered by the FMLA or that Plaintiff's migraine headaches are a serious health condition entitling her to medical leave. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.114(c). Further, for purposes of this motion, Whirlpool does not dispute that Plaintiff provided appropriate notice of her condition. Instead, Whirlpool argues only that Plaintiff failed to provide proper medical certification of her need for medical leave. Specifically, Whirlpool contends that its attendance policy requires in all cases that an employee submit written medical certification supporting the need for FMLA leave

and that Plaintiff failed to meet this requirement. Human Resources Guide § 6.07. Whirlpool further asserts that Plaintiff received and had actual notice of this policy through her receipt of the handbook and that she was terminated in accordance with this policy due to her failure to comply with this requirement.

Plaintiff responds that she was not required to provide medical certification because an employer is obligated to request medical certification with respect to each instance of FMLA leave, if it desires such certification, and that Whirlpool failed to request certification for each separate absence she took. In support, Plaintiff points to the FMLA regulations which state that "[a]n employer must give notice of a requirement for medical certification each time a certification is required." 29 C.F.R. § 825.305(a).

Plaintiff also argues that Whirlpool waived its medical certification requirement because Rick Jorata told Plaintiff that she did not have to tell him each time she had a migraine. However, the Court rejects Plaintiff's claim that Whirlpool waived its medical certification requirement. Even if such a waiver had occurred, Rick Jorata's comments would have resulted only in a waiver of the notice requirement, and not the medical certification requirement.

Thus, the issue before the Court is whether, as a matter of law, Whirlpool's statement in its employee manual is sufficient to require Plaintiff to provide medical certification in order to receive leave under the FMLA. In short, the issue is whether this statement relieved Whirlpool of its obligation under the law to specifically request a certification each time that Plaintiff sought FMLA leave. There is little authority on this issue. In Cianci v. Pettibone Corp., No. 95-C-4906, 1997 WL 182279 (N.D. Ill. Apr. 8, 1997) (unpublished), the court specifically raised this question, but did not resolve it. In Cianci, the court noted that the employee handbook

indicated that a medical certification was required, but when the employee made her leave request, no one mentioned such a requirement or asked for documentation for the leave. Id. at *6. The Court declined to address whether the employee manual requirement was sufficient, however, since it decided the case on other grounds. Id.

In Stubl v. T.A. Sys., Inc., 984 F. Supp. 1075 (E.D. Mich. 1997), the employer, T.A., argued that the plaintiff, Mr. Stubl, had not provided the proper medical certification for his FMLA leave. When the plaintiff requested leave, the employer attached a copy of its leave policy to the letter requesting leave. The policy stated that medical leave "is granted when sufficient medical evidence is submitted." Id. at 1086. The court held that this notice was insufficient because, although informing the plaintiff that the company required medical information, it did not inform Mr. Stubl of his rights under the FMLA. The court stated in part as follows:

> Therefore, because Stubl had actual notice of this internal requirement at the time he requested his leave, it could be argued that additional notice would have been redundant and unnecessary.
>
> While this seemingly indicates that Mr. Stubl's leave is not covered because he failed to comply with T.A.'s internal requirement, T.A.'s purported notice was seriously defective. Under the pertinent regulations, the notice from the employer must detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations, including any requirement for the employee to provide medical certification and the consequences of failure to do so. If a company's notification is conveyed via an employee manual, as in this case, the instrument must clearly incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA.

Id. at 1086-87 (citations omitted). Thus, Stubl contemplates that an employee manual may provide proper notice of an employer's medical certification requirement if it is given to the

employee when leave is requested and if it also satisfies the FMLA requirements in 29 C.F.R. § 825.301 concerning employer notification.

As noted, the FMLA requires that the "employer must give notice of a requirement for medical certification each time a certification is required." 29 C.F.R. § 825.305(a) (emphasis added). In Stubl, as a matter of practice, the employer attached a copy of its leave policy to each employee's request for leave, which Whirlpool did not do in the instant case. Thus, the question here becomes whether the mere existence of these provisions in the policy manual, without any particularized act of notification, fulfills Whirlpool's obligation to notify Plaintiff "each time a certification is required."

The Court finds that the existence of the certification requirement in the policy manual, by itself, does not satisfy Whirlpool's obligation to notify Plaintiff when it requires certification. The regulations place the burden of giving the employee information upon the employer and permit the employer, when it so desires, to notify the employee that medical certification is needed. The regulations clearly contemplate that the employer may not need certification for every FMLA absence and any additional requirement for providing notice of absences should be conducted, in the first instance, through "informal means." 29 C.F.R. § 825.303(b).

Whirlpool's wholesale reliance on its employee manual converts the right of the employer to require medical certification into an additional obligation on the employee in order to exercise of his or her rights under the statute. By claiming that a statement in the policy manual is a blanket requirement to provide medical certification each time an absence is taken shifts the burden in this context from the employer to the employee and results in a significant modification of the statute. The effect would be to write into the law a trip to the doctor every

time an employee requests medical leave. This result is contrary to the terms of the statute, illogical, and inconsistent with the legislative intent. Therefore, the Court concludes, as a matter of law, that a blanket requirement for medical certification in the policy manual cannot satisfy an employer's obligation to notify an employee that medical certification is requested "each time a certification is required."[5] The law mandates that an employer communicate its desire for medical certification in each instance that it deems it necessary to meet its legal obligation to determine whether the leave sought qualifies under the FMLA. Accordingly, Defendant's motion for summary judgment on Plaintiff's FMLA claim is hereby denied.

IV

Whirlpool also has moved for summary judgment on Plaintiff's claim for intentional infliction of emotional distress. Under Oklahoma law, recovery for the tort of intentional infliction of emotional distress is strictly limited to circumstances where the acts committed are so extreme or outrageous as to demand redress. As the Oklahoma Supreme Court stated,

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

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[5] The Court notes that in the case of a chronic medical condition, the regulations provide that an employer generally may not request recertification of a medical condition more often than every thirty days. 29 C.F.R. § 825.308. By holding that Whirlpool's policy manual does not satisfy its obligation to request medical certification "each time a certification is required," the Court recognizes that "each time" may generally occur only after thirty days.

Breeden v. League Services Corp., 575 P.2d 1374, 1376 (Okla. 1978) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). The events giving rise to the complaint must be judged within the context in which the events occurred. Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) (stating that "[t]he salon of Madame Pompadour is not to be likened to the rough-and-tumble atmosphere of the American oil refinery").

Whirlpool claims that Plaintiff has not satisfied the strict requirements for an intentional infliction of emotional distress claim since Whirlpool took reasonable actions in response to Plaintiff's complaints of harassment. Whirlpool further notes that even if Whirlpool violated Title VII or the FMLA, this conduct does not amount to intentional infliction of emotional distress. See Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1388 n.9 (10th Cir. 1991).

Plaintiff bases this claim upon the same evidence as her sexual harassment claim. Although citing a law review article indicating that sexual harassment can have harmful effects on workers, Plaintiff fails to indicate how Plaintiff suffered those effects and how Whirlpool's actions constitute extreme or outrageous conduct, considering in particular the adequacy of Whirlpool's response to the alleged harassment. The Court finds that Defendant's actions alleged here does not rise to the level of extreme or outrageous conduct. See McClain v. Southwest Steel Co., 940 F. Supp. 295, 300 (N.D. Okla. 1996); Eddy, 715 P.2d at 77.[6] Accordingly, Defendant's motion for summary judgment on this claim is hereby granted.

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[6] Plaintiff also argues that Whirlpool can be held liable for the actions of Mr. Johnson since it has "ratified" Mr. Johnson's actions by failing to conduct a proper investigation of the sexual harassment claim. Assuming, arguendo, that Whirlpool, as Defendant, could be held liable for the acts of an employee, the Court still finds that Mr. Johnson's actions would not rise to the level sufficient to maintain a claim for intentional infliction of emotional distress under Oklahoma law.

V

For the reasons set forth above, Defendant Whirlpool's motion for summary judgment (Docket # 21) is hereby granted in part and denied in part.

IT IS SO ORDERED.

This 12TH day of August, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY L. NEWMAN,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

Case No. 97-CV-184-H(J)

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 15).

In accordance with 28 U.S.C. § 636(a) and Fed. R. Civ. P. 72(a), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. Plaintiff is hereby awarded $2,631.73 in attorneys' fees.

IT IS SO ORDERED.

This 12th day of August, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 14 1998

BETTY L. NEWMAN,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

Case No. 97-CV-184-H(J)

FILED

AUG 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Plaintiff's application for an award of attorneys' fees under the Equal Access to Justice Act. The Court duly considered the issues and rendered a decision in accordance with the order filed on August 7, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant for attorneys' fees in the amount of $2,631.73.

IT IS SO ORDERED.

This 12TH day of August, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD A. DREHER, SR.,)
)
Petitioner,)
)
vs.) Case No. 97-CV-502-H (J)
)
STEVE HARGETT,)
)
Respondent.)

ORDER

Before the Court is Respondent's "motion to dismiss petition for lack of jurisdiction" (Docket #7). Petitioner has filed a response to the motion to dismiss (#9). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On June 5, 1995, Petitioner pleaded guilty in Tulsa County District Court, Case No. CF-93-4522, to five counts of Sexually Abusing a Minor Child, one count of Sexual Battery, and one count of Intimidating a State's Witness. He received sentences of forty-five (45) years imprisonment on each of the first five counts, and five and ten years respectively, on the last two counts. He did not file a Motion to Withdraw his guilty plea or otherwise perfect a direct appeal. Respondent represents that on February 14, 1997, Petitioner filed an application for post-conviction relief in Tulsa County District Court. (#8 at 4). That court denied the requested relief on March 10, 1997. (See #8, Ex. A). Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals on April 15, 1997.

(See #8, Ex. A). However, the state appellate court dismissed the appeal as untimely on May 18, 1997. (#8, Ex. A). Petitioner's petition for writ of habeas corpus was file-stamped in this Court on May 27, 1997 (#1). The "Declaration Under Penalty of Perjury," found on the last page of the habeas corpus petition, was executed by Petitioner on May 19, 1997. (#1 at 10).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run form the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose

conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, __ F.3d __, 1998 WL 419727 (10th Cir. June 24, 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to move to withdraw his guilty plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his guilty plea, his conviction became final ten (10) days later, on June 15, 1995. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on May 27, 1997, or 398 days after April 24, 1996. However, the time during which Petitioner had "a properly filed application for State post-conviction or other collateral review" should be subtracted from this 398 days. Thus, the 24 days from February 14, 1997 (when Petitioner filed his application

for post-conviction relief) to March 10, 1997 (when the state district court denied the application for post-conviction relief) should not be counted.[1] The resulting elapsed time on Petitioner's limitations period is 374 days, beyond the one-year time limit. Even recognizing the filing date as the earliest date on which Petitioner could have given his petition to prison officials for mailing does not save the petition in this case. See Hoggro, 1998 WL 419727, at *3 n.4. As stated above, the "Declaration Under Penalty of Perjury" was executed by Petitioner on May 19, 1997, eight (8) days prior to the Court's receipt of the petition. Assuming Petitioner gave the petition to prison officials for mailing on May 19, 1997,[2] an additional 8 days should be deducted from the elapsed time resulting in a total of 366 days, again beyond the one-year limit. Therefore, the Court concludes that the petition for writ of habeas corpus is untimely and Respondent's motion to dismiss this petition as time-barred should be granted.[3]

---

[1]The Court will not count the additional time during which Petitioner appealed the denial of his application for post-conviction relief because that appeal was dismissed by the Oklahoma Court of Criminal Appeals as untimely. Section 2244(d)(2) requires a court to subtract time only for the period when the petitioner's "properly filed" post-conviction application is being pursued. See 28 U.S.C. § 2244(d)(2).

[2]The Court notes that the prison log for outgoing mail would be required to provide sufficient evidence of the date on which a petitioner gave a pleading to prison officials for mailing. However, in this case, since Petitioner could not have given his petition to the prison officials for mailing prior to his execution of the "Declaration Under Penalty of Perjury," the Court finds it is unnecessary for the parties to provide the mail log.

[3]The Court notes that Respondent seeks dismissal of the petition "for lack of jurisdiction" (#8). Respondent's contention that this Court lacks jurisdiction due to Petitioner's untimely filing is erroneous. Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). Therefore, the Court emphasizes that although dismissal is appropriate in this case due to Petitioner's failure to comply with the filing requirements of § 2244(d) as defined in Simmonds, 111 F.3d at 746, the dismissal is not due to lack of jurisdiction.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#7) is **granted.**

2. The petition for writ of habeas corpus is **dismissed with prejudice.**

IT IS SO ORDERED.

This 12TH day of August, 1998.

Sven Erik Holmes
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK WESLEY KELLEY,)
)
Petitioner,)
)
vs.) Case No. 97-CV-1007-B (J)
)
RON WARD,)
)
Respondent.)

ENTERED ON DOCKET

DATE 8-14-98

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 13th day of Aug, 1998.

Thomas R. Brett

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK WESLEY KELLEY,)
)
Petitioner,)
)
vs.) Case No. 97-CV-1007-B (J)
)
RON WARD,)
)
Respondent.)

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus as barred by statute of limitations (Docket #5). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss and supporting brief (#7). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On March 21, 1985, Petitioner was sentenced in Tulsa County District Court, Case No. CRF-84-3918, after being tried and convicted of Robbery with Firearms(Count I); Shooting with Intent to Kill (Count III); and Escape from Lawful Custody (Count IV), all After Former Conviction of Two or More Felonies. He was sentenced to 150 years imprisonment on Count I, 500 years on Count III and 50 years on Count IV, with the sentences to be served consecutively. (#6, Ex. A). Petitioner appealed to the Oklahoma Court of Criminal Appeals where the judgment and sentence

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was affirmed on January 5, 1988. (#6, Ex. B). Petitioner filed a petition for rehearing which was denied by the Court of Criminal Appeals on January 28, 1988 (#6, Ex. C). Nothing in the record indicates Petitioner filed a petition for *certiorari* in the United States Supreme Court.

Petitioner filed an application for post-conviction relief in the state trial court on September 19, 1988, arguing that the escape count was improperly enhanced. That court denied relief on October 7, 1988. (#6, Ex. D). Petitioner appealed to the Oklahoma Court of Criminal Appeals where the denial of post-conviction relief was reversed on November 17, 1988. On December 9, 1988, the state district court modified Petitioner's sentence on the escape count from 50 years to 2 years. See #6, Ex. E. Thereafter, Petitioner filed a second application for post-conviction relief alleging that he was denied effective appellate and trial counsel, that his sentences were enhanced with improper convictions from Texas, and the trial court failed to instruct the jury that prior convictions can only be considered for purposes of punishment and not guilt or innocence. Those claims were denied by the state courts as procedurally defaulted. (#6, Ex. E). Significant to the issue raised by the motion to dismiss filed in this case, Respondent represents that Petitioner filed a third application for post-conviction relief in the state trial court on April 11, 1997. That court denied relief on June 18, 1997. (#6, Ex. F). Petitioner filed his petition in error and supporting brief on July 22, 1997, and, on August 6, 1997, the Oklahoma Court of Criminal Appeals dismissed the appeal as untimely pursuant to Rule 5.2(C)(2), *Rules of the Court of Criminal Appeals*. Petitioner filed the instant federal petition for writ of habeas corpus on December 16, 1997 (#3).[1]

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[1]The Court notes that on November 13, 1997, Petitioner paid the $5.00 filing fee required to commence a habeas corpus action and filed a "motion to exceed twenty-five (25) page restriction" (#1). In that motion, Petitioner stated that he "is in the process of preparing a Petition for a Writ of Habeas Corpus pursuant to Title 28 U.S.C. Section 2254."

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run form the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal

habeas corpus relief.

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, __ F.3d __, 1998 WL 419727 (10th Cir. June 24, 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to petition the United States Supreme Court for *certiorari*, his conviction became final on May 2, 1988, ninety (90) days after the Oklahoma Court of Criminal Appeals denied Petitioner's petition for rehearing. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on December 16, 1997, or 601 days after April 24, 1996. However, the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" should be subtracted from this 601 days. Thus, the 68 days from April 11, 1997 (when Petitioner filed his third application for post-conviction relief) to June 18, 1997 (when the state district court denied post-conviction relief) should not be counted.[2] The resulting elapsed time on Petitioner's limitations period is 533 days, well beyond the one-year limit. Therefore, the Court concludes that Respondent's motion to dismiss this petition as time-barred should be granted.

---

[2]The Court will not count the additional time during which Petitioner appealed the denial of his third application for post-conviction relief because that appeal was dismissed by the Oklahoma Court of Criminal Appeals as untimely. Section 2244(d)(2) requires a court to subtract time only for the period when the petitioner's "properly filed" post-conviction application is being pursued. See 28 U.S.C. § 2244(d)(2).

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#5) is **granted**.

2. The petition for writ of habeas corpus is **dismissed with prejudice.**

SO ORDERED THIS 17th day of August, 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES W. HENDRICKSON, Plaintiff, v. AMR AIRLINE GROUP, INC., a Delaware corporation, AMERICAN AIRLINES, INC., a Delaware corporation, and JIM G. ZINK, Managing Director, Facilities & Maintenance Engineering, Defendants.	)	ENTERED ON DOCKET DATE AUG 14 1998 Case No. 96 CV 962 BU

FILED
AUG 13 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff James W. Hendrickson and Defendants AMR Airline Group, Inc., American Airlines, Inc. and Jim G. Zink, by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.) CIVIL ACTION NO. 96-0053-J
)
ROBERT W. HOPPER,)
Defendant.)

ORDER ADMINISTRATIVELY CLOSING CASE

Having reviewed the Joint Motion To Administratively Close Case Pending Resolution of Bankruptcy Adversary Proceedings filed by the Parties, and good cause having been shown, the Court finds and concludes that this matter should be administratively closed during the pendency of the bankruptcy adversary proceedings, Adversary Number 98-0226-M, involving the debt which is the subject of this action before the United States Bankruptcy Court for the Northern District of Oklahoma.

IT IS THEREFORE ORDERED that the Court Clerk administratively close this action pending either resolution of the bankruptcy proceedings or for further action in this matter.

The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within thirty (30) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

IT IS SO ORDERED this 12 day of August, 1998

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REBA J. AVEY,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-948-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 11th day of AUG., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(16)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

REBA J. AVEY,

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant

CASE NO. 97-CV-948-M

ENTERED ON DOCKET
DATE AUG 13 1998

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of §205(g) of the Social Security Act, 42 U.S.C. §405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 11th day of AUG., 1998.

Frank H. McCarthy
United States ~~District~~ MAGISTRATE Judge

(15)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM E. SPARKS AND PATTY S. SPARKS, and others similarly situated,

Plaintiff(s),

vs.

BANCOKLAHOMA MORTGAGE CORP.,

Defendant(s).

ENTERED ON DOCKET
DATE AUG 13 1998

Case No. 97-CV-588-BU(J)

FILED
AUG 11 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Plaintiff filed a Motion to Dismiss on September 8, 1997. [Doc. No. 4-1]. The Motion was referred by the District Court for Report and Recommendation by minute order dated September 7, 1997.

Oral argument on the motion was held July 24, 1998. Plaintiffs appeared by and through attorneys Gary Eaton and Hart L. Robinovitch. Defendant appeared by and through attorneys Michael Medina and Frederic Dorwart.

Plaintiffs have alleged a breach of contract, breach of fiduciary duty, and a Racketeer Influenced and Corrupt Organizations ("RICO") cause of action against Defendant. Defendant's Motion to Dismiss is directed solely to Plaintiffs' RICO claim.

Plaintiffs allege that Defendant is the "person" associated with an enterprise comprised of Defendant, Bank of Oklahoma, N.A., and BOK Financial Corporation. Defendant argues that Plaintiffs have not and cannot meet the RICO statutory requirement that the enterprise and person be separate. Defendant notes that the

(20)

RICO cause of action is Plaintiff's sole basis for federal jurisdiction. Because Plaintiff cannot meet this requirement, Defendant asserts that Plaintiff's RICO claim should be dismissed and that the remaining state claims asserted by Plaintiff should be dismissed because no further reason for federal jurisdiction exists.

Plaintiffs assert that Plaintiffs meet the "enterprise/person" requirement under three theories. Defendant has labeled Plaintiffs' three "enterprise/person" theories as: (1) the mortgage/lender enterprise, (2) the association-in-fact enterprise, and (3) the affiliated entities enterprise. Plaintiff additionally claims that even if Plaintiff did not have a RICO cause of action, jurisdiction in federal court would be appropriate because Plaintiff's claim involves interpretation of Real Estate Settlement and Procedures Act ("RESPA").[1/]

The Court has thoroughly considered the arguments and the case law referenced by the parties. The Court recommends that the District Court **SUSTAIN** Defendant's Motion to Dismiss with respect to Plaintiffs' "mortgage/lender" enterprise and Plaintiffs' "association-in-fact enterprise." The Court recommends that the District Court **DENY** Defendant's Motion to Dismiss with respect to Plaintiffs' asserted affiliated entities enterprise. Plaintiffs' RICO cause of action should remain in the lawsuit, with the enterprise/person requirement limited to the affiliated entities theory.

[1/] Defendant correctly points out that Plaintiffs submitted a 44 page brief, in excess of the page limitation imposed in this district, and without permission of the Court. Plaintiffs discuss numerous issues not raised by Defendant. In general, Plaintiffs' brief is not focused on the issue raised by Defendant. Of the 44 pages, approximately seven pages address the issue raised by Defendant. Plaintiffs brief does not focus on the more recent cases cited by Defendant and does not deal with Defendant's analysis which distinguishes the precedents relied upon by Plaintiffs.

I. FACTUAL BACKGROUND

Plaintiffs assert that Defendant, as a servicer of residential mortgage loans, requires homeowners to maintain excessive balances in their mortgage escrow impound accounts. According to Plaintiffs, the mortgage contracts provided for a surplus of between zero and two months' deposits, with two months being the maximum. Plaintiffs assert that the amounts required by Defendant has routinely exceeded the maximum permissible amount.

Plaintiffs identify Defendant as the mortgage servicer. Plaintiffs assert that Defendant is part of a corporate group comprised of Bank of Oklahoma, N.A. ("Bank Oklahoma"), and BOK Financial Corporation ("BOK"). According to Plaintiffs, Bank Oklahoma and BOK delegated to Defendant the responsibility for servicing the mortgages. Plaintiffs assert that income received by Defendant was upstreamed to Bank Oklahoma and BOK and reported on their respective financial statements, and that capitol raised by Defendant was used to fund the entire enterprise.

Plaintiffs maintain that, pursuant to applicable law, lenders are prohibited from maintaining a reserve that exceeds the lesser of either (a) the maximum authorized by the mortgage contract, or (b) the RESPA ceiling of a two-month aggregate cushion. Plaintiffs assert that by requiring homeowners to maintain escrow amounts in violation of statutory and contractual law Defendant has violated the mortgage contract and RESPA.

Plaintiffs allege that Defendant used the United States Mails while servicing the residential loans, and that statements sent through the mail were not truthful or

accurate. According to Plaintiffs, Defendant used the mail for multiple purposes in furtherance of Defendant's scheme. Plaintiffs assert that Defendant deliberately engaged in the alleged mail fraud.

According to Plaintiffs, the group that Defendant is a part of constitutes an enterprise as defined by the statute. According to Plaintiffs, Bank Oklahoma and BOK provide guidance and instruction to Defendant with regard to mortgage escrow practices.

Plaintiffs request treble damages for the asserted RICO violations.

II. RICO ACTION: MOTION TO DISMISS

Plaintiffs assert a cause of action arising under RICO. Defendant asserts that Plaintiffs cannot meet the "enterprise" requirement under RICO which requires a separate "person" and "enterprise." Plaintiffs assert that the "person" is Defendant, Bancoklahoma Mortgage Corporation, and that the enterprise consists of Defendant, Bank Oklahoma and BOK. Plaintiff acknowledges that the Defendant is a subsidiary corporation of the parent company Bank Oklahoma.

A. RICO BACKGROUND

Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") in 1970. The RICO act was designed as a potent criminal statute and was aimed at eradicating organized crime syndicates. See "Amending the Racketeer Influenced and Corrupt Organizations Act," Senate Report No. 101-269, April 24, 1990, 1990 WL 263549. To meet this goal, RICO introduced new concepts and

provided broad remedies, including the sought after treble damages -- referred to by defense counsel as damoclean or draconian depending upon their choice of metaphor.

Along with the criminal codifications, RICO also provides for a private civil cause of action in § 1964(c). The statute permits a private cause of action for "any person injured in his business or property" by conduct which violates the Act. The Act further provides that a successful plaintiff "shall recover threefold the damages he sustains and costs of the suit, including a reasonable attorney's fee."

The greatest potential for abuse lies within the civil RICO arena.

> In its private civil version, RICO is evolving into something quite different from the original conception of its enactors. (Justice White, Sedima, S.P.R.I. v. Imres, Inc., 105 S. Ct. 3275, 3287 (1985).)
>
> * * * *
>
> Congress . . . may well have created a runaway treble damage bonanza for the already excessively litigious. (Schact v. Brown, 711 F.2d 1466 (7th Cir. 1983) (Judges Wood, Cummings, Hoffman).)

Id. at 2. During the first decade following its enactment, RICO was used almost exclusively in criminal cases. See "RICO Amendments Act of 1991," H.R. Rep. No. 102-312, November 13, 1991, 1991 WL 243408. During the mid 1980's, filings of civil RICO cases began to expand dramatically. While only 270 civil RICO cases were reported from 1970-1985, the Administrative Office of the U.S. Courts indicates that since 1985 approximately 1,000 civil RICO cases have been filed each year. Id. at 6 (referring to letter dated June 9, 1989, from L. Ralph Mecham, Director,

Administrative Office of the United States Courts to the Honorable William J. Hughes, Chair, House Subcommittee on Crime.

The explosion of civil RICO filings has led to a sharp debate among judges and commentators over the wisdom of permitting this growth of civil RICO, and has led to speculation over whether civil RICO filings have gone well beyond Congressional intent. As noted in the dissent in Sedima, "it defies rational belief, particularly in light of the legislative history, that Congress intended this far reaching result." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 530 (1985) (Justice Powell, dissent). Those who favor curtailing the expansive reach of RICO claim that imaginative attorneys use RICO's threat of treble damages to leverage favorable settlements in ordinary civil cases. They note that the statute is being abused in a manner never intended by Congress and now poses the threat of treble damages for "garden-variety civil fraud cases." Id. Others argue that Congress intended to create a broad remedy to deal with the described illegal activity whether the practitioners were mobsters or corporate vice-presidents.

The Supreme Court has, in five cases, interpreted the scope of RICO. In each case the Court has declined to interpret it restrictively.[2/] See Goldsmith, Michael, "Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO," 30 Harv.

[2/] In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Court observed, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, ... but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.' The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity. . . . Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c) from the statute."

J. on Legis. 1, 8-9 (1993). Congress drafted a broad statute. Numerous courts have suggested that the statute is overly broad and should be restricted by Congress. Congress has, on two occasions since the initial passage of RICO, considered legislation which would make RICO more restrictive. See "RICO Amendments Act of 1991," H.R. Rep. No. 102-312, November 13, 1991, 1991 WL 243408; "Amending the Racketeer Influenced and Corrupt Organizations Act,"Senate Report No. 101-269, April 24, 1990, 1990 WL 263549. Each of these proposed pieces of legislation failed, and RICO remains essentially unchanged since its initial passage.

This Court is dealt the formidable task of insuring that these severe RICO remedies are neither abused or misused while giving to Plaintiffs the full benefit of the statutory remedies provided by Congress.

B. General Requirements of a RICO Complaint and the RICO Statute

To survive a motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6) a plaintiff must sufficiently plead the following RICO elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Bacchus Industries, Inc. v. Arvin Industries, Inc., 939 F.2d 887, 891 (*citing* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). In addition, the Tenth Circuit Court of Appeals has concluded that with respect to RICO mail fraud allegations, Fed. R. Civ. Pro. 9(b), which requires fraud to be averred with particularity, applies to "each element of a RICO violation and its predicate acts of racketeering." Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 989 (10th Cir. 1992). See also Brannon v. Boatmen's Bancshares, Inc., 952 F.

Supp. 1478 (W.D. Okla. 1997); Aitken v. Fleet Mortgage Corporation, 1992 LEXIS 1687 (N.D. Ill. 1992); Mark v. Keycorp Mort. Inc., 1996 WL 465400, at 8 (N.D. Ill.1996).

Plaintiffs assert a cause of action under 18 U.S.C. § 1962(c). This statute provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Person" is defined as any "individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1963(4). An enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. United States v. Turkette, 452 U.S. 576 (1981).

The statute has consistently been read and interpreted as requiring a separate "enterprise" and "person." Courts addressing the issue have generally concluded that an employee of a corporation and the corporation cannot be "separate" for the purpose of establishing a RICO enterprise. See, e.g., Board of County Comm'rs v. Liberty Group, 965 F.2d 879, 886 (10th Cir. 1992); Fitzgerald v. Chrysler Corp. 116 F.3d 225 (7th Cir. 1997) ("The courts have excluded this far-fetched possibility by holding

that an employer and its employees cannot constitute a RICO enterprise."), *citing* Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063 (2d Cir. 1996); Riverwoods Cappaqua Corp. v. Marine Midland Bank N.A., 30 F.3d 339, 343-44 (2d Cir. 1994). But see Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995). The remaining issue, and the question posed by Defendant in Defendant's Motion to Dismiss, is whether a RICO defendant (the "person") can be a subsidiary corporation of the "enterprise."

C. THE ENTERPRISE AND PERSON REQUIREMENT

Defendant asserts that Plaintiffs cannot meet the requirement that the "enterprise" be distinct and separate from the person. Plaintiffs assert three possibilities for holding that Plaintiffs meet the separate and distinct requirement. Defendant has labeled the three "enterprise/person" theories as the: (1) the mortgage/lender enterprise, (2) the association-in-fact enterprise, and (3) the affiliated entities enterprise.

1. Mortgage/Lender and Association-in-Fact

Plaintiffs do not develop their "mortgage/lender" or "association-in-fact" theories of RICO enterprises. Defendant notes that even the cases upon which Plaintiffs rely as supporting their RICO claim have concluded that the mortgage-lender and association-in-fact theories are unsupportable. The Court has considered the reasoning of the Northern District of Illinois District Court in Miller v. Chevy Chase Bank, 1998 WL 142394 (N.D. Ill. March 24, 1998), and Goss v. Alliance Mortgage Co., 1997 WL

119918 (N.D. Ill. 1997), and finds it persuasive. These two theories simply do not support finding a RICO enterprise. This Court recommends that the District Court not find a RICO Enterprise pursuant to these two theories.

2. Subsidiary and Parent as Person and Enterprise

Under Plaintiffs' "associated enterprise" theory, Defendant is associated with an enterprise consisting of the Defendant, its parent corporation Bank Oklahoma, and BOK. The alleged enterprise is funding and servicing first mortgage loans. The requirements of a RICO enterprise are present save one troubling question which is the issue raised by Defendant's Motion to Dismiss. Can a subsidiary corporation (Defendant Bankoklahoma Mortgage Corporation) be a person separate and distinct from its parent corporation (Bank Oklahoma) such that a RICO enterprise exists? Two cases in the Tenth Circuit provide some direction on this issue. The Court also considers other circuits which have considered or which counsel urges have considered the question.

TENTH CIRCUIT:

In Board of County Commissioners v. Liberty Group, 965 F.2d 879 (10th Cir. 1992), the county sued a broker for securities fraud. The Tenth Circuit Court of Appeals concluded that the enterprise must be distinct from the RICO defendant.

> As the jury instructions and the predominant view in the cases make clear, under § 1962(c) it is required that the "person" and the "enterprise" engaged in racketeering activities be different entities.

Id. at 885. The Tenth Circuit noted that eleven circuits had addressed this issue and ten of those circuits had concluded that the RICO "enterprise" and "person" must be distinct. Id. at 885 n.4. The court was not presented with the parent-subsidiary distinctiveness question.

This "distinctness" requirement of a RICO enterprise parent and a subsidiary was addressed in this Circuit by Judge Cauthorn in Brannon v. Boatmen's Bancshares, Inc., 952 F. Supp. 1478 (W.D. Okla. 1997). In Brannon, the plaintiffs alleged that the bank improperly purchased insurance on financed automobiles. The primary issue was whether the plaintiffs had sufficiently pled the existence of a RICO "enterprise." The plaintiff alleged that the bank was the RICO defendant (person). The "enterprise" was described very loosely. The court noted that it could "glean no distinction between the description of Bancshares and the Bancshare "group" when plaintiffs describe the two using the same definition." Id. at 1485.

Brannon raises the issue presented by the parties in this litigation.

> These allegations raise the question of whether a corporation person can be distinct from its subsidiary corporations or its parent corporation. A number of courts have recognized that a corporation is not distinct from its subsidiaries for RICO purposes.

Id. at 1486 (citations omitted). Brannon cites to seven cases from four circuits. The court's broad statement supports Defendant's position that a subsidiary and a parent are not distinct for the purpose of RICO. However, the statement should not be applied beyond the facts of Brannon which are significantly different from this case. In fact, the court did not have to reach this conclusion in its decision. The court

observed, "[w]ithout pleading that Boatmen's and Bancshare were distinct in some manner other than their existence as separate corporate entities, the court finds that the allegations are insufficient to support each other as enterprise and defendant." Id. at 1487. Therefore, Brannon is essentially a pleading case in which the court concluded that the plaintiffs had not pled a distinct enterprise and person. Note that neither Brannon nor the cases its cites state that a corporate parent and subsidiary can never constitute a RICO enterprise. They simply say that without additional allegations of distinctiveness they have not been pled as separate parties within the facts of each case.

The facts presented to the court in Brannon are not the facts of this case. Plaintiffs have pled distinct and separate entities which conducted distinct and separate functions. Plaintiffs allege Defendant (the "person") serves as a mortgage servicer of loans. Plaintiffs allege that the enterprise (consisting of Bank Oklahoma, BOK, and Defendant) finances and secures residential loans. The Court concludes that Plaintiffs have adequately pled separate and distinct functions of the person and enterprise.

No other cases in the Tenth Circuit have specifically addressed this issue. Brannon refers to other circuits as holding that a subsidiary and parent corporation are not distinct under RICO. These cases are additionally relied upon by Defendant in Defendant's Motion to Dismiss.[3/]

[3/] Most of the cases which conclude that a subsidiary either is or is not distinct from the parent for RICO purposes provide virtually no explanation for the conclusion. In Elysian Federal Savings Bank v. First (continued...)

FIRST CIRCUIT

In Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21 (1st Cir. 1988), an insurance agent plaintiff had been terminated by the defendant. The court appears to hold that the plaintiff failed to properly plead a person separate and distinct from the enterprise.

> Throughout his brief and pleadings below, Odishelidze has continued to characterize the enterprise as Aetna and its subsidiaries and employees without specifically identifying a defendant, distinct from the enterprise, which conducted the enterprise's activities through a pattern of racketeering activity.

Id. at 23. The Odishelidze court was not presented with the parent/subsidiary distinctness requirement and provides little direction for the Court in this case.

3/ (...continued)
Interregional Equity Corporation, 713 F. Supp. 737 (D. N.J. 1989), the court categorized those circuits which have concluded that the corporation and subsidiary are not distinct as following the reasoning of the Supreme Court in Copperweld which held that a corporation and subsidiary cannot conspire to violate antitrust law. Id. at 758. Elysian concluded that the parent and the subsidiary should be treated as distinct pursuant to RICO. "First, as indicated above, a 'person' is defined under RICO as 'any individual or entity capable of holding a legal or beneficial interest in property. A separately incorporated entity is clearly capable of holding a legal or beneficial interest in property. . . . Second, the cases which have indicated parent companies and their wholly-owned subsidiaries lack the necessary separateness for RICO purposes have apparently relied upon the Supreme Court decision in Copperweld. Copperweld held that a parent corporation and its wholly-owned subsidiary are not capable of conspiring with one another for purposes of section one of the Sherman Act, because that Act is premised on the 'basic distinction between concerted and independent action.' Corporations and their individual operating divisions were historically deemed one entity for purposes of evaluating the possible existence of an antitrust conspiracy between two persons. Intending to eliminate antitrust motivations to organize business units as divisions rather than subsidiaries, the court in Copperweld rejected the long standing notion of the 'bathtub conspiracy' whereby a parent corporation and its wholly-owned subsidiary were considered two separate parties capable of conspiring. As pointed out in the cases which discuss the applicability of Copperweld in the RICO context, the more reasoned conclusion is that parents can be considered 'persons' capable of associating with their subsidiaries under RICO." Id. at 758 (citations omitted).

SECOND CIRCUIT:

Discon, Inc. v. Nynex Corp., 93 F.3d 1055 (2d Cir. 1996), is likewise less than clear. In Discon, the plaintiff, a "removal service" for telephone companies sued NYNEX, a holding company, and several wholly-owned subsidiaries, "MECo", "NYTel," and "NET." The court noted that in pleading the person and enterprise requirement, Plaintiff "redefines the enterprise as the 'NYNEX Group,' which consists of the three corporations, NYNEX, MECo, and NYTel. Discon [plaintiff] claims that these three corporate 'persons' conducted the affairs of the NYNEX Group 'enterprise' through a number of illegal predicate acts." The court concluded that the subsidiary and parent corporations were not separate for the purpose of RICO.

> [T]he individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness. It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable. . . .

Id. at 1064.

Rather than focusing on the legal issue, the court appears to have recognized the policy inconsistency which has consistently plagued the courts - that is, that recognizing a subsidiary/parent as a person/enterprise encourages vertical integration. The court provides very little beyond the "corporate consciousness" argument to support its decision.

THIRD CIRCUIT:

In Brittingham v. Mobil Corp. et al., 943 F.2d 297 (3rd Cir. 1991), the purchasers of defective trash bags filed an action against the maker of the trash bags, its subsidiary, and their advertising agency. The court explained that the plaintiff had failed to plead a separate enterprise and person.

> The enterprise is alleged to consist of Mobil, Mobil Chemical, and their advertising agencies. Because Mobil and Mobil Chemical were named as defendants, neither one alone could be alleged as the enterprise. Moreover, as Petro-Tech indicates, plaintiffs could not name Mobil as the defendant and its subsidiary, Mobil Chemical as the enterprise. We do not believe that the grouping of defendants with their advertising agencies changes the result. The advertising agencies were defendants' agents, and did no more than conduct the normal affairs of the defendant corporations.

Id. at 302. The court concluded:

> [w]ithout additional allegations, therefore, a subsidiary corporation cannot constitute the enterprise through which a defendant parent corporation conducts racketeering activity.

Id. at 302-303. The court hinted at the type of "additional allegations" which would be necessary to change the result.

> Petrotech holds that a defendant also named as an enterprise cannot be held vicariously liable for the actions of its employees. A plaintiff cannot circumvent this holding merely by alleging that the enterprise is an association in fact consisting of the defendant and the individuals or entities acting on its behalf. Without allegations or evidence that the defendant corporation had a role in the racketeering activity that was distinct from the undertakings of those acting on its behalf, the distinctiveness requirement is not satisfied.

Id. at 302. Plaintiffs have alleged the type of "distinctiveness" contemplated by the Brittingham court.

The third circuit revisited this issue in Lorenz v. CSX Corporation, 1 F.3d 1406 (3rd Cir. 1993). Bond holders sued the corporation, its shareholders, and an indenture trustee for breach of securities laws. The court referred to Brittingham, explaining that in that case, "[n]either the complaint nor RICO case statement alleged any basis by which the parent corporation and its subsidiary were sufficiently distinct for purposes of stating a RICO claim." Lorenz, 1 F.3d at 1412. The court further explained:

> After Brittingham, and Glessner, it is still theoretically possible for a parent corporation to be the defendant and its subsidiary to be the enterprise under section 1962(c). However, the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity which is distinct from the activities of its subsidiary. A RICO claim under section 1963(c) is not stated where the subsidiary merely acts on behalf of, or to the benefit of, its parents.

Lorenz, 1 F.3d at 1412. Lorenz concluded that the plaintiff had not properly pled the requisite person and enterprise.

Unlike Lorenz, Plaintiffs have asserted that the subsidiary (rather than the parent corporation) is the "person." In addition, Plaintiffs have asserted separate and distinct acts by the parent corporation and the subsidiary corporation.

FOURTH CIRCUIT:

NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1986), involved an action against a lender for the miscalculation of the prime rate in interest calculations. The plaintiff claimed that NCNB (the subsidiary) was the RICO defendant

and that the bank holding company was the enterprise. (This situation is similar to the case presented by the parties presently before this Court.) The court concluded that the situation did not present a separate and distinct person and enterprise. According to the court "[t]he record contains no evidence regarding NCNB's relationship with the holding company other than the holding company received a substantial portion of their revenue as dividends from NCNB." The court noted that "appellants concede this court has previously held that a 'person' is not distinct from an 'enterprise' when a corporation and its wholly owned subsidiary are involved." The court refers to United States v. Computer Sciences Corporation, 689 F.2d 1181, 1190-91 (4th Cir. 1982) which held that a corporation and a corporate division are not separate for the purpose of RICO. The court does not explain or otherwise develop its decision.

SEVENTH CIRCUIT:

The seventh circuit is the repository of most if not all RICO cases arising out of excessive mortgage escrows due to the many class actions consolidated within the Northern District of Illinois by the Multidistrict Litigation Panel. The "original" seventh circuit case is Haroco v. American National Bank and Trust Company of Chicago, 747 F.2d 384 (7th Cir. 1984), *affirmed* 473 U.S. 606 (1985). In Haroco, the plaintiffs alleged that the bank had defrauded them in the calculation of the prime rate on plaintiffs' loans. The plaintiffs alleged the bank was a RICO defendant (person/subsidiary) and that the parent company was the enterprise. The Seventh Circuit Court of Appeals noted that "a subsidiary corporation is certainly a legal entity distinct from its parent." The court noted that "defendants do not challenge this point.

. . ." The court did not further elaborate on the distinctness of a corporation and a subsidiary.[4/]

In Aitken v. Fleet Mortgage Corporation, 1992 LEXIS 1687 (N.D. Ill. 1992), the plaintiff alleged that the defendant maintained excessive surpluses in customers escrow accounts in violation of RICO. The RICO Defendant was Fleet, and the enterprise was identified as the Fleet/Norstar Financial Group. The specific issue which this Court addresses was not clearly identified in Aitken. However, the Aitken court found that the plaintiff had adequately alleged a RICO enterprise. The court noted that, "[t]hrough participation in the enterprise, Fleet, in all likelihood, had access to a larger capital and customer base and thereby gained the opportunity to service additional mortgages. Such access would facilitate its ability to carry out a scheme to defraud its customers through excessive escrow charges." See also Goss v. Alliance Mortgage Co., 1997 WL 119918 (N.D. Ill. 1997); Mark v. Keycorp Mortgage Co., 1996 WL 465400 (N.D. Ill. 1996); Butler et al. v. Platte Valley Mortgage Corporation, 1995 WL 875412 (N. D. Ill. 1995); Leff v. Olympic Federal, slip opinion, No. 86-C-3026 (N.D. Ill. Sept. 18, 1986) (all mortgage escrow cases, finding RICO properly pled with RICO defendant as subsidiary and parent as the enterprise).

The Seventh Circuit decided two cases after Haroco, in opinions written by Judge Richard Posner, which seem to limit the extent of Haroco. In Fitzgerald v. Chrysler Corporation, 116 F.3d 225 (7th Cir. 1997), consumers brought a class action

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[4/] Although the Seventh Circuit did not elaborate, traditionally corporate parents and subsidiaries are treated as legally distinct entities for liability and taxing purposes. As noted above (footnote 3), corporate parents and subsidiaries are not considered distinct in the antitrust area.

against the defendant for warranty fraud. Chrysler was the RICO defendant and the enterprise was alleged to consist of Chrysler and the Chrysler dealers. The Seventh Circuit determined that Chrysler and the Chrysler dealers did not constitute a separate enterprise from Chrysler. The court reasoned that the dealers acted as mere conduits of Chrysler and were not distinct.

> But it is enough to decide this case that where a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise within the meaning of the statute.

Fitzgerald, 116 F.3d at 228.

However, the Fitzgerald court also reaffirmed Haroco.

> In the next step beyond that, and now coming as close to this case as any case has yet done, the criminal seizes control of a subsidiary of a corporation and perverts the subsidiary into a criminal enterprise that manages in turn to wrest sufficient control or influence over the parent corporation to use it to commit criminal acts; and the issue is whether the subsidiary can be deemed the RICO "person." Our decision in Haroco allowed the subsidiary to be deemed the RICO "person" conducting the affairs of its parent through a pattern of racketeering activity, without requiring, as in our hypothetical case, that the subsidiary participate in the control of the parent. But that requirement was later imposed by the Supreme Court in Reves v. Ernst & Young, limiting Haroco.

Id. at 227.

In Emery v. American General Finance, Inc., 134 F.3d 1321 (7th Cir. 1998), the plaintiffs asserted RICO mail fraud charges against the lender for sending fraudulent loan refinancing offers through the mail. American General Finance Corporation was the RICO defendant and the holding company was the asserted enterprise. The Seventh Circuit concluded that the allegations did not distinguish a separate person from the asserted enterprise.

> The misunderstanding of RICO that defeated the firm [in Fitzgerald] persists in the present appeal. The plaintiff's lawyer continues despite Fitzgerald to believe that the requirement in a case such as this of proof that defendants conducted the affairs of an enterprise through a pattern of racketeering activity is satisfied merely by showing that the pattern of predicate acts (the mail frauds, in this case) were committed by a firm that has agents or affiliates. That is not enough. The firm must be shown to use its agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality.

Id. at 1323-24 (citations omitted). The court again affirmed Haroco's approval of a subsidiary as a distinct entity from a RICO enterprise.

> It would be different if as in Haroco criminals took over a corporate subsidiary which then managed to wrest control of the parent and use the parent as an instrument for further criminal activities.

Id. at 1324 (citations omitted).

The Court, in reviewing the facts and situations presented by the parties in this case, in Haroco, in Fitzgerald, and in Emery, concludes that the Haroco situation is most similar. Furthermore, the only Northern District of Illinois case to address the

separate requirements of an enterprise and person within the mortgage escrow context after Fitzgerald and Emery, concluded that the plaintiffs alleged a RICO complaint.

In Miller v. Chevy Chase Bank, F.S.B., 1998 WL 142396 (N.D. Ill. 1998), the Illinois court considered an excess mortgage escrow case identical to the case at bar. Plaintiff asserted that the "subsidiary," Chevy Chase, was the RICO defendant, and the defendant's corporate parents and other subsidiaries were the "enterprise."

> Section 1962(c) is satisfied when a criminal seizes control of a subsidiary of a corporation, perverting it into a criminal enterprise which participates in the control of the parent. This Circuit is clear that the subsidiary must participate in control of the parent in order to be deemed a RICO enterprise. Fitzgerald v. Chrysler Corp., 116 F.3d 225, 227 (7th Cir. 1997). The relevant test is the so-called operation or management test which holds the control element satisfied when lower-rung participants operate the enterprise under the direction of upper management. MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 979 (7th Cir. 1995); Poindexter v. Nat'l Mort. Co., 1995 WL 242287, *6 (N.D. Ill.1995).
>
> Chevy Chase maintains that the Millers do not allege that Chase participated in the enterprise's control pursuant to this test. Chase maintains that the Millers do not allege that it over-mortgaged at the direction of any of its mortgage lenders. The Millers' complaint alleges the following: (1) that Chevy Chase's affiliates delegated responsibility to service the mortgages at issue and have issued guidelines for mortgage escrow practices to Chevy Chase; (2) that Chase upstreamed income derived from those mortgages to its owner and nonowner affiliates; (3) that the Chevy Chase Capital Group raised capital based on financial statements reporting the income earned through Chevy Chase's escrow practices; (4) and that Chase services these mortgages. I find that these allegations sufficiently allege direction from the mortgage lenders to withstand a motion to dismiss. They show that Chase is clearly a lower-rung participant in the alleged corporate

group that includes it, and it directs the affairs of its parents and affiliates by determining how much to demand in escrow payments on the mortgages it services. See Butler, 1995 WL 875412 at *2.

In attacking the enterprise in Millers' complaint, Chevy Chase next argues that by servicing the Millers' mortgage, it conducts its own affairs and not the affairs of its parent or affiliates. This is § 1962(c)'s distinct entity requirement. The Seventh Circuit has explicitly held that it is "virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation." Haroco, 747 F.2d at 402-03 (7th Cir.1984). See also Mark v. Keycorp Mort. Inc., 1996 WL 465400, at *8 (N.D. Ill.1996). Fitzgerald v. Chrysler Corp., 116 F.3d 225, 227 (7th Cir.1997), does not alter this holding, but merely requires that participation in control be established.

The Millers allege Chevy Chase's parents engage in the common business of commercial and consumer finance, have delegated their business of servicing residential mortgage transactions to their subsidiary, and that Chevy Chase has conducted those affairs through a pattern of mail fraud. The Millers further allege that the income derived from the unlawful practices at issue were upstreamed to its parents. I hold that these allegations are sufficient under Fitzgerald, 116 F.3d at 227, to establish that Chevy Chase conducted or participated in the affairs of the enterprise. See also Butler, 1995 WL 875412, at *3.

The Seventh Circuit's recent opinion in Emery v. American General Finance, Inc., 134 F.3d 1321, 1998 WL 28111 (7th Cir.1998), does not change my analysis. In Emery the court noted that Fitzgerald stood for the proposition that a firm must use its subsidiaries (and, presumably, vice-versa) in a manner similar to the paradigmatic RICO case in which a criminal obtains control of a legitimate firm and uses that firm as the instruments of his criminality. Id. at *3. Under the facts as alleged in Emery, the defendants did not control the frauds that constituted the RICO violations. They merely devised them. Id. at *4. In the words of the Seventh Circuit, the Emery defendants did not allegedly have their "own little bailiwick" carved out from the

> legitimate corporate hierarchy. Id. As I discussed above, that is not the case here. The Millers have alleged that Chevy Chase controlled the fraudulent escrowing practices for Chase's, its parent's, and its affiliates' benefit, distinguishing the Millers' allegations from those in Emery.

Miller, 1998 WL 142394 at 2-3.

Likewise, in Majchrowski et al. v. Norwest Mortgage, Inc., 1998 WL 274663 (N.D. Ill. 1998), the court concluded that the plaintiffs had met the requirements of a separate person and enterprise. In Majchrowski, the plaintiffs asserted that the defendant filed a fraudulent proof of claim in bankruptcy alleging improper fees. The complaint alleged that Norwest was the RICO defendant (person) and that the corporate group which included Norwest's parent was the enterprise. The court noted that plaintiff is required to identify the enterprise, establish that the enterprise is separate from the RICO person and plead that the RICO person participated in the operation or management of the enterprise. The court used language especially appropriate to the case at bar.

> [T]he allegations in this case do not suffer from the Richmond- Fitzgerald-Emery maladies. First, by making the subsidiary (Norwest) the RICO person and the parent (NC) and its corporate group the enterprises, plaintiffs place this case squarely within Haroco. Under Haroco (and as confirmed by Richmond), a subsidiary is presumptively (and perhaps conclusively) distinct from its parent. See 747 F.2d at 402; see also Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 348-49 (N.D. Ill.1997) ("the Seventh Circuit has clearly indicated that subsidiary corporations are separate entities that 'conduct the affairs of' their parent corporations") (citations omitted); Butler v. Platte Valley Mortgage Corp., 1995 WL 875412, at *2 (N.D. Ill. Oct.25, 1995) (citing Haroco for the same proposition).

> Second, the allegations read liberally under Fed. R. Civ. P. 8(a) demonstrate that the NC enterprises (unlike those in Richmond and Fitzgerald) did have some part in masking or facilitating the unauthorized fee scheme, and that Norwest (unlike the RICO person in Emery) had its own distinct role. The complaint forthrightly alleges that Norwest is responsible for devising and implementing the alleged scheme to defraud. NC, meanwhile, delegated its mortgage servicing line of business to Norwest, enabling Norwest to implement its allegedly illicit design to charge bankrupt borrowers illegal fees under the claimed authority of the mortgage contracts. In short, the legitimate mortgage servicing business delegated by NC allegedly masked Norwest's fee scheme. Moreover, the fruits of this fraud were allegedly upstreamed to NC and reported on NC's financial statements--statements that begot capital investments that NC in turn used to fund Norwest's operations, including its nefarious mortgage service fee collection business. As such, the fraud did not "begin and end" with Norwest; rather, it integrally involved NC, which delegated the mortgage servicing scheme to Norwest and financed its continued operation.

Summary

The court has tediously reviewed the cases relied upon by Plaintiffs and Defendant. Several cases are easily distinguished. Others appear to reach a contrary conclusion but with little analysis. What remains clear is that the only courts to have examined the question of whether a subsidiary corporation is distinct from its parent corporation under the RICO statute in the mortgage escrow context are in the seventh circuit. Specifically, Judges Zagel and Castillo have examined the issue presented to this court on at least six occasions, and each time have answered that question "yes." The Court finds the reasoning of the N.D. of Illinois courts persuasive given the statutory language of RICO.

The Court realizes that by finding that the corporation and the subsidiary are distinct in this case, and by allowing the RICO claim to proceed, the Court reaches a result that would change if a corporation had its own employees servicing its mortgages rather than a subsidiary corporation. This Court does not enjoy threading needles and tiptoeing along the chalk lines while attempting to remain in-bounds to find a result consistent with the statutory language which Congress has provided. Numerous courts have expressed similar frustration.

> RICO is a recurring nightmare for federal courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jettisoned an effusion of opinions which bobble in its wake. (In re Dow Co. Sarabond Products Liability Litigation, 666 F. Supp. 1466 (D. Colo. 1987) (Judge Kane).).
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> * * * *
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> We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now. (Illinois Dep't of Rev. v. Phillips, 771 F.2d 313, 317 (7th Cir. 9185) (Judges Bauer, Coffey, Campbell).).

"Amending the Racketeer Influenced and Corrupt Organizations Act," Senate Report No. 101-269, April 24, 1990, 1990 WL 263549. Such frustrations have led to at least two attempts to amend the statute. However, the statute remains unchanged, and the Court must conclude that Congress intends the result.

The Court recommends that the District Court find that Plaintiffs have successfully pled the separate "person" and "enterprise" requirements to establish a cause of action under RICO.

III. RESPA AND FEDERAL JURISDICTION

Plaintiffs state in their brief that they do not assert a private cause of action under RESPA.[5/] At oral argument, Plaintiffs noted that absent Plaintiffs' RICO cause of action, Plaintiffs' complaint asserted state causes of action based on breach of contract and breach of fiduciary duties. Plaintiffs nevertheless request that the District Court retain jurisdiction, if the District Court dismisses the RICO cause of action, because the action may involve interpretation of RESPA, which is a federal statute.

Defendant relies on Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986). The Tenth Circuit has discussed the requirements of federal court jurisdiction.

> Federal courts are courts of limited jurisdiction; they must have a statutory basis for their jurisdiction. In the instant case, the parties are not diverse. Therefore, if federal subject matter exists, it must arise under a law of the United States. A case arises under federal law if its "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Thus, a district court may exercise jurisdiction when the cause of action is created by federal law or turns on a substantial question of federal law. Plaintiff does not claim that his cause of action is created by federal law. . . .
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> In Smith v. Kansas City Title & Trust Co., the Supreme Court held that federal jurisdiction can be found in state-law created causes of action if the right to relief turns on the

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[5/] The majority of the Circuits interpreting this issue have concluded that no private cause of action exists. See, e.g., Collins v. FMHA-USDA, 65 U.S.L.W. 2599 (Feb. 18, 1997); State of Louisiana v. Litton Mortgage Co., 50 F.3d 1298 (5th Cir. 1995); Allison v. Liberty Savings, 695 F.2d 1086 (7th Cir. 1982). See contra Vega v. First Federal Savings & Loan Assoc. of Detroit, 622 F.2d 918, 925 n.8 (6th Cir. 1980). The Tenth Circuit Court of Appeals has not yet decided this issue.

> construction of a federal law. Nevertheless, the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." When making the determination of whether a nonfederal claim turns on a substantial question of federal law, courts should exercise "prudence and restraint." Restraint is necessary because "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system."

Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994) (citations omitted).

The Court has reviewed Plaintiffs' complaint and Plaintiffs' asserted cause of action. Because the Court has recommended that Plaintiffs' RICO cause of action not be dismissed, a decision on whether or not RESPA confers separate federal jurisdiction is not necessary. The Court therefore declines to reach this issue.

IV. RECOMMENDATION

The United States Magistrate Judge recommends that Defendant's Motion to Dismiss be **DENIED**.

V. OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the

party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 11th day of August 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 13th Day of August, 1998.

Linda M. Collins

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GENE WADE SCOTT,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. 97-CV-1003-B (M)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 12th day of Aug., 1998.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GENE WADE SCOTT,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. 97-CV-1003-B (M)

ORDER

Before the Court is Respondent's "motion to dismiss petition for habeas corpus as time barred by the statute of limitations" (Docket #5). On April 23, 1998, the Court entered its Order (#7) directing Petitioner to respond within thirty (30) days to Respondent's motion to dismiss. However, to date Petitioner has failed to file a response to the motion. Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On April 15, 1991, Petitioner pleaded guilty in Creek County District Court, Case No. CRF-90-283, to First Degree Murder. He received a sentence of life imprisonment. (#6, Ex. A). He did not file a Motion to Withdraw his guilty plea or otherwise perfect a direct appeal. On April 5, 1996, Petitioner filed an application for post-conviction relief in Creek County District Court. (See #7, Ex. B). That court denied the requested relief on September 17, 1996. (#7, Ex. B). Petitioner did not appeal the post-conviction denial to the Oklahoma Court of Criminal Appeals. Ex. A). Petitioner

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filed his petition for writ of habeas corpus in this Court on November 10, 1997 (#1). Pursuant to this Court's deficiency Order, Petitioner filed his amended petition on December 8, 1997 (#3).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run form the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that

for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, __ F.3d __, 1998 WL 419727 (10th Cir. June 24, 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to move to withdraw his guilty plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his guilty plea, his conviction became final ten (10) days later, on April 25, 1991. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on November 10, 1997, or 565 days after April 24, 1996. However, the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" should be subtracted from this 565 days. Thus, the 146 days from April 24, 1996 (the beginning of the grace period) to September 17, 1996 (when the state district court denied the application for post-conviction relief) should not be counted. The resulting elapsed time on Petitioner's limitations

period is 419 days, beyond the one-year time limit. Therefore, the Court concludes that the petition for writ of habeas corpus is untimely and Respondent's motion to dismiss this petition as time-barred should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#5) is **granted**.

2. The petition for writ of habeas corpus is **dismissed with prejudice.**

SO ORDERED THIS 12th day of Aug, 1998.

Thomas R. Brett

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCEL LAMAR JACKSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 97-CV-398-K (M)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 11 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCEL LAMAR JACKSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 97-CV-398-K (M)

ORDER

Before the Court is Respondent's "motion to dismiss for lack of jurisdiction pursuant to 28 U.S.C. § 2244" (Docket #9). Petitioner has filed a response to the motion to dismiss (#11). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On January 4, 1994, Petitioner pleaded *nolo contendere* to Shooting with Intent to Kill and Possession of a Firearm, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CRF-93-939 (See #10, Ex. A). On October 5, 1994, the Oklahoma Court of Criminal Appeals denied Petitioner's *certiorari* appeal (#10, Ex. A). Petitioner's application for post-conviction relief was denied by the trial court and the denial was affirmed on appeal by the Oklahoma Court of Criminal Appeals on December 19, 1995 (#10, Ex. B). Petitioner's petition for writ of habeas corpus was file-stamped in this Court on April 25, 1997 (#1).[1]

[1]Respondent erroneously identifies the file-stamped date of the petition as July 11, 1997, the date Petitioner filed his opening brief in support of his petition for habeas corpus (#7).

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ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run form the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date

of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief. In Simmonds, 111 F.3d at 746, the Tenth Circuit Court of Appeals expressly stated that "prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motion before April 24, 1997." Id. (citing Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd* on other grounds, 117 S.Ct. 2059 (1997), for the proposition that "reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under [28 U.S.C.] § 2244(d) and . . . 28 U.S.C. § 2255").

Recently, the Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, __ F.3d __, 1998 WL 419727 (10th Cir. June 24, 1998). Therefore, the one-year grace period is tolled during time spent pursuing state post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to petition the United States Supreme Court for *certiorari*, his conviction became final 90 days after the Oklahoma Court of Criminal Appeals denied Petitioner's *certiorari* appeal, or on or about January 3, 1995. See Caspari v. Bohlen, 510 U.S. 383 (1994); Simmonds, 111 F.3d at 744. Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Nothing in the record provided by the parties indicates the one-year period has been tolled in this case.

The petition for writ of habeas corpus is file-stamped April 25, 1997, two days beyond the termination of the one-year grace period, as recognized by the Tenth Circuit Court of Appeals. Simmonds, at 746. Even recognizing the filing date as the date on which Petitioner gave his petition to prison officials for mailing does not save the petition in this case. See Hoggro, 1998 WL 419727,

at *3 n.4. In his response to the motion to dismiss, Petitioner states that he gave his petition to prison officials for mailing on April 24, 1997 and provides a copy of the prison mail log in support of his contention. (#11, Ex. 1). However, as previously stated, a petition for writ of habeas corpus must be filed *before* April 24, 1997, to be timely filed within the one-year grace period. Petitioner's petition, filed *on* April 24, 1997, fails to meet the grace period parameters defined in Simmonds. Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 1441 F.3d 976, 978 (10th Cir. 1998), Petitioner attempts to justify his late filing by arguing only that he did not receive notice of the § 2244(d) amendment until June 1, 1997, more than one month after he filed his petition. For that reason, Petitioner asserts he "should have a one-year 'grace' period for filing his petition beginning on June 1, 1997, the date on which [he] first received fair notice of the filing deadline." (#11 at 10). The Court finds Petitioner's argument unpersuasive since he had from January 2, 1995 to file his federal habeas petition in addition to the one-year grace period announced in Simmonds. Therefore, Petitioner does not offer sufficient explanation for his failure either to pursue diligently his claims or to comply with the April 23, 1997 deadline. The Court concludes that the petition for writ of habeas corpus is untimely and Respondent's motion to dismiss this petition as time-barred should be granted.[2]

[2]The Court notes that Respondent seeks dismissal of the petition "for lack of jurisdiction pursuant to 28 U.S.C. § 2244" (#9). Respondent's contention that this Court lacks jurisdiction due to Petitioner's untimely filing is erroneous. Miller, 141 F.3d at 978. Therefore, the Court emphasizes that although dismissal is appropriate in this case due to Petitioner's failure to comply with the filing requirements of § 2244(d) as defined in Simmonds, 111 F.3d at 746, the dismissal is not due to lack of jurisdiction.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#9) is **granted**.

2. The petition for writ of habeas corpus is **dismissed with prejudice.**

SO ORDERED THIS 11 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY LYNN BRITT,

Petitioner,

vs.

RITA MAXWELL, Warden of the Jess Dunn Correctional Center,

Respondent.

ENTERED ON DOCKET

DATE AUG 12 1998

Case No. 96-CV-990-Bu(J)

REPORT AND RECOMMENDATION

Petitioner, Timothy Lynn Britt, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, acting *pro se*, argues that by failing to raise a double jeopardy objection at Petitioner's July 26, 1994 sentencing hearing, Petitioner's counsel was ineffective. Respondent filed a response on June 22, 1998. [Doc. No. 17]. The Court granted Petitioner until August 3, 1998 to file a reply. [Doc. No. 17]. Petitioner has not filed a reply. The matter has been referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636; Fed. R. Civ. P. 72. For the reasons discussed below, the undersigned recommends that Petitioner's petition for a writ of habeas corpus be **DENIED**.

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I. PROCEDURAL BACKGROUND

On June 17, 1994, Petitioner appeared with his counsel at a plea hearing before a Tulsa County district judge. Petitioner pled no contest to one count of assault and battery with a dangerous weapon. Petitioner's no contest plea was entered pursuant to a plea agreement with the Tulsa County district attorney's office.

The following colloquy occurred before the Tulsa Country district judge at the on June 17, 1994 plea hearing:

> THE COURT: CF-93-5975, he's here with his attorney, Mr. Beckert, the State's here with Assistant District Attorney, Mr. Bret Jennings.
>
> Assault and battery with a dangerous weapon. Information alleges the offense occurred on December the 29th, 1993. Range of punishment's up to 10 years.
>
> What's the State's recommendation?
>
> MR. JENNINGS: Your Honor, State's recommendation is for a 6-year term with a presentence investigation, $500 fine, $250 Victim's Compensation, 80 hours of community service.
>
> MR. BECKERT: That's our understanding, Your Honor.
>
> THE COURT: All right. The sentencing date will be on July the 26th at 10:30. Have your 80 hours of community service done by that date.

Transcript of Plea Hearing, Doc. No. 15, Exhibit A, p. 2. The Court then asked Petitioner a series of questions to determine (1) whether Petitioner's plea was knowing and voluntary, (2) whether Petitioner understood that he was presumed innocent, and

(3) whether Petitioner understood that he was waiving his right to jury trial.[1/] Id. at pp. 2-4. The colloquy with the Court then continued as follows:

THE COURT: I've told you the range of punishment, you've heard the State's recommendation. Understanding that, do you still wish to waive and give up your right to trial and enter a plea of no contest?

MR. BRITT: Yes, sir.

THE COURT: Counsel, I take it you'll stipulate if State's witnesses were called, their testimony would be sufficient to find your client guilty beyond a reasonable doubt?

MR. BECKERT: Yes, Your Honor.

THE COURT: The Court's going to determine the defendant's plea of no contest is freely and voluntarily entered. And based on the stipulation of the State's witnesses, the Court would determine their testimony is sufficient to find the defendant guilty beyond a reasonable doubt. I'll make that finding, then withhold it.

. . . .

Also, this is a serious charge and I do give consideration to the victim and how she feels about this.

MR. BRITT: Yes, sir.

THE COURT: You still want to enter your plea?

MR. BRITT: Yes, sir.

Transcript of Plea Hearing, Doc. No. 15, Exhibit A, pp. 4-5.

[1/] In this habeas action, Petitioner has not alleged that he was not informed of his rights or that his plea was not voluntary.

Petitioner completed his 80 hours of community service between June 17, 1994 and July 26, 1994. During that same time frame, a presentence investigation was conducted and a report was prepared for the Tulsa County district judge's review. Petitioner appeared with counsel on July 26, 1994 at his sentencing hearing. The following colloquy occurred at the sentencing hearing:

THE COURT: Okay. All right. This is CF-93-5975, Timothy Britt, set for sentencing today. He's here with his attorney, Mr. Beckert. State's here with Assistant District Attorney, Sarah Smith.

There is a presentence report in writing. And I take it the defendant's had an opportunity to review it?

MR. BECKERT: Judge, we have. We've also had a conference with the Court off the record. We understand that the Court is not going to follow the recommendation contained in the PSI. We've had a conference on that, certainly respect the Court's position, but at the same time disagree.

We understand the Court's going to place Mr. Britt in the penitentiary for a term of 6 years.

THE COURT: Yes. Yes. And there is a Victim Impact Statement. The victim is here and I appreciate the victim coming to court. I have read it and it is a very aggravated case. I will state in the record I have reviewed this. The facts are just extremely aggravated, and also the defendant does previously have a felony conviction.

The State's recommendation is 6 years?

MS. SMITH: Yes, sir.

THE COURT: I will follow the State's recommendation and find the defendant guilty and sentence him to 6 years custody of the Department of Corrections, $500 fine, $250 Victim's Compensation Fund.

Transcript of Sentencing Hearing, Doc. No. 15, Exhibit B, pp. 2-3.

Based on the facts outlined above, Petitioner argues that he was in effect sentenced twice for the same crime -- once on June 17, 1994 to 80 hours community service and once on July 26, 1994 to six years in prison and fines. Petitioner argues that this violates the double jeopardy clause of the fifth amendment to the United States Constitution and that his counsel was ineffective for not rasing a double jeopardy objection at the July 26, 1994 hearing. Petitioner argues that his counsel's ineffectiveness violates his sixth amendment right to effective assistance of counsel.

Petitioner filed an application for post-conviction relief in Tulsa County. See 22 Okla. Stat. § 1086. Petitioner's application for post-conviction relief was denied by the Tulsa County court on April 23, 1996. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed the denial of post-conviction relief on July 16, 1996. The OCCA held that Petitioner had waived his claims because they could have been raised in a direct appeal but were not. Thus, the OCCA held that Petitioner's claims were procedurally barred. See Doc. Nos. 10 and 14 for the Court's discussion of and treatment of the doctrine of procedural bar in this case.

II. DISCUSSION

The double jeopardy clause of the fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy." The double jeopardy clause provides a criminal defendant with three protections -- it protects a defendant from being prosecuted a second time for the same offense after an acquittal; it protects a defendant from being prosecuted a second time for the same offense after a conviction; and it protects against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 497-98 (1984). There is no successive prosecution problem in this case. Rather, Petitioner argues that he has been subjected to multiple punishments for the same offense.

Multiplicity of punishment occurs only when more than one count of an indictment covers the same criminal behavior. To support a multiple punishment double jeopardy claim, a defendant must show that two offenses are charged, which in law and in fact are the same. In multiple punishment situations, the double jeopardy clause does no more than prevent the sentencing court from prescribing a punishment greater than what the legislature intended. It is presumed that a legislature does not intend to impose two punishments for two offenses which are in fact and in law the same, regardless of what labels are placed on the offenses. Missouri v. Hunter, 459 U.S. 359, 366 (1983); United States v. Richardson, 86 F.3d 1537, 1551 (1996).

Petitioner was never charged with multiple offenses. He was only charged with assault and battery with a dangerous weapon. Thus, Petitioner never faced the possibility of being punished for two offenses which were in fact and in law the same.

Petitioner received one punishment (i.e., community service, fines and imprisonment) for one offense (i.e., assault and battery with a dangerous weapon). Plaintiff was told specifically at his June 17, 1994 plea hearing that the State of Oklahoma was recommending that he be sentenced to a 6-year prison term, a $500 fine, a $250 Victim's Compensation fine, and 80 hours of community service. Petitioner's attorney announced in open court that this was his understanding of the parties' plea agreement and Petitioner did not object. The judge then ordered Petitioner to serve 80 hours of community service and the judge deferred deciding on what length of prison term to impose until after he had a chance to review a pre-sentence investigation report. Petitioner returned on July 26, 1994 and the parties argued over the length of the prison term to be imposed. The judge finally accepted the State's recommendation of six years and formally sentenced Petitioner to six year in prison.

CONCLUSION

Petitioner was not subject to successive prosecutions for the same offence. There was only one prosecution -- a prosecution which included a plea hearing and a sentencing hearing. There was also no point in time at which Petitioner could have been punished for two offenses which were in fact and in law the same. Thus, at no time during this process was Petitioner twice put in jeopardy for the same offence. Because Petitioner never had a valid double jeopardy objection, his counsel could not have been ineffective for failing to make a meritless double jeopardy objection. The

undersigned recommends, therefore, that Petitioner's petition for a writ of habeas corpus be denied.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 11 day of August 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 12th Day of August, 1998.

C Portillo, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALL STATE TANK CO., INC.,

Plaintiff,

v.

COLUMBIAN STEEL TANK CO.,

Defendant.

Case No. 97-CV-188-H

AMENDED J U D G M E N T

The Court previously entered judgment in favor of Plaintiff and against Defendant in the amount of $48,925.00. The Court also recently entered an order awarding Plaintiff $97,275.00 in attorneys' fees and $2,023.00 in prejudgment interest. Accordingly, the judgment in this case is hereby amended to include the amount of attorneys' fees and prejudgment interest.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the previous judgment is vacated and the amended judgment is hereby entered for Plaintiff and against Defendant in the amount of $148,223.00.

IT IS SO ORDERED.

This 10TH day of August, 1998.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 98CV0489BU(M)
	)	
Thomas B. Odom,	)	
	)	
Defendant.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 10th day of August, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of August, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Thomas B. Odom, 3410 S. 73rd W. Ave., , Tulsa, OK 74107-1588.

Libbi L. Felty

Libbi L. Felty
Paralegal Specialist

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

BILL R. RUTHERFORD;
GEORGIA D. RUTHERFORD
aka Diane Rutherford;

Defendants.

CIVIL ACTION NO. 96-C-374-K

AGREED JUDGMENT

This matter comes on for consideration this 7 day of August, 1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; and the Defendants, Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford, appear by their attorney Joey D. Schmidt.

The Court being fully advised and having examined the court file finds that the Defendants, Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford, were served with Summons and Complaint on June 25, 1996 by a United States Deputy Marshal. On July 16, 1996, Defendants, Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford, were mailed a copy of the Amended Complaint through their attorney Joey D. Schmidt.

The Defendants, Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford, agree that they are indebted to the Plaintiff in the amount alleged in the Amended Complaint and that judgment may accordingly be entered against Bill R. Rutherford and

Georgia D. Rutherford aka Diane Rutherford in the principal amount of $201,234.55 as of July 15, 1998, plus interest thereafter at the legal rate until fully paid.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Farm Service Agency, formerly known as Farmers Home Administration, have and recover judgment against the Defendants, Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford, in the principal sum of $201,234.55 as of July 15, 1998, plus interest thereafter at the current legal rate of 5.438 percent per annum until fully paid.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
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Attorney for Defendants,
Bill R. Rutherford and Georgia D. Rutherford aka Diane Rutherford

Agreed Judgment
Case No. 96-C-374-K (Rutherford)

PB:css

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MOHAWK FIELD SERVICES, INC. an Oklahoma corporation,

Plaintiff,

versus

AUGUSTA SERVICE COMPANY, INC., a Georgia corporation,

Defendant.

Case No. 97-CV-1014K

STIPULATION FOR DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), the parties stipulate that this matter may be dismissed with prejudice to further litigation.

Respectfully submitted,

Dave Keglovits, OBA No. 14259
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JASON LANCE SULLIVENT,

Petitioner,

vs.

H. N. "SONNY" SCOTT,

Respondent.

Case No. 96-CV-1140-K (M)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 7 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JASON LANCE SULLIVENT,

Petitioner,

vs.

H. N. "SONNY" SCOTT,

Respondent.

Case No. 96-CV-1140-K (M)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #6) entered on May 28, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be dismissed. On June 15, 1998, Petitioner filed his objection to the Report (#8).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

Petitioner was convicted of First Degree Murder by a jury in Tulsa County District Court, Case No. CRF-87-4399. He received a sentence of life imprisonment. Petitioner did not file a direct appeal. Approximately six years after his conviction, Petitioner sought post-conviction relief in the trial court, claiming that (1) he had been provided ineffective assistance of counsel, (2) the state failed to prove the intent element necessary for a first degree murder conviction, and (3) the trial

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court judge abused his discretion during trial proceedings. On May 10, 1996, the state district court denied post-conviction relief. Petitioner appealed to the Oklahoma Court of Criminal Appeals. On April 11, 1996, that court remanded the case to the state district court for further findings of fact and conclusions of law relating to Petitioner's claim that he was denied an appeal through no fault of his own. Specifically, the district court was directed to address "whether Petitioner prevented his attorney from filing a direct appeal or whether the attorney determined not to file the direct appeal without consulting Petitioner." (#4, Ex. D at 5).

On May 13, 1996, in compliance with the directive from the appellate court, the district court filed its "Order Making Additional Findings of Fact and Conclusions of Law." (#4, Ex. E). Therein, the trial court stated that the sentencing transcript did not reflect that Petitioner or his attorney gave oral notice of intent to appeal. Furthermore, the trial court found that at no time prior to the filing of the application for post-conviction relief, some six years after his conviction, had Petitioner filed anything in the case indicating that Petitioner desired to appeal his conviction. Also, the State filed a supplemental response in the case containing an affidavit of Petitioner's attorney, Larry Oliver. Mr. Oliver stated that after sentencing, he discussed the possibility of appeal with Petitioner and his family. According to Mr. Oliver's affidavit, Petitioner and his family decided not to appeal the conviction. Based on that record, the trial court concluded that "Petitioner's claim that he was denied an appeal through no fault of his own is without basis either in fact or in law." (#4, Ex. E at 4). After receiving the district court's additional findings of fact and conclusions of law, the Oklahoma Court of Criminal Appeals affirmed the district court's denial of post-conviction relief finding that Petitioner had waived his claims by failing to raise them on direct appeal and that he had not demonstrated that he was denied an appeal through no fault of his own. (#4, Ex. G).

Petitioner filed the instant habeas corpus action on December 11, 1996. He presents three claims: (1) ineffective assistance of counsel based on trial counsel's failure to perfect a direct appeal, (2) the jury instructions violated due process, and (3) the state courts' imposition of a procedural bar denied Petitioner due process and equal protection of law. Based on Petitioner's failure to perfect a direct appeal, Respondent argues that Petitioner's claims are procedurally barred from federal habeas corpus review. However, Petitioner in effect argues ineffective assistance of counsel as cause for his failure to perfect a direct appeal. He further maintains that he is "innocent" of first degree murder since the state failed to prove the element of intent beyond a reasonable doubt.

In his Report, the Magistrate Judge found that Petitioner had met the exhaustion requirements of 28 U.S.C. § 2254 and concluded that Petitioner defaulted his claims in state court by failing to perfect a direct appeal. According to the Magistrate Judge, the factual findings of the state courts concerning Petitioner's claim that he had been denied an appeal through no fault of his own due to ineffective assistance of counsel are presumed to be correct unless rebutted by clear and convincing evidence. The Magistrate Judge found that Petitioner failed to make the necessary showing and, therefore, presumed the findings of fact to be correct. Also, the Magistrate Judge concluded that Petitioner's claims did not fall within the narrow "fundamental miscarriage of justice" exception to the procedural bar doctrine and as a result, the petition for writ of habeas corpus should be dismissed as procedurally barred.

Petitioner objects to the Magistrate Judge's conclusions, alleging that it was erroneous to apply the "presumed to be correct" standard to the findings of fact made by the state courts, that he has demonstrated "cause and prejudice" and a "fundamental miscarriage of justice" to overcome the procedural bar, and that he is entitled to an evidentiary hearing on his claims.

DISCUSSION

The habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides that:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (e)(1). In this case, because the state courts considered the factual basis of Petitioner's argument that he had been abandoned by trial counsel after sentencing and that, as a result, he had failed to perfect a direct appeal through no fault of his own, and made specific factual findings concerning those allegations, those factual findings are presumed correct. Therefore, contrary to Petitioner's objection, the Magistrate Judge applied the correct standard, as mandated by the statute, in reviewing Petitioner's claim. Petitioner has offered no new evidence on the issue of whether trial counsel provided ineffective assistance in failing to perfect a direct appeal to rebut the state courts' findings. Therefore, those findings are presumed correct. Petitioner's ineffective assistance of counsel claim fails and the Court agrees with the Magistrate Judge's conclusion that Petitioner has failed to demonstrate cause for the procedural default of his claims.

The Court also agrees with the Magistrate Judge's conclusion that Petitioner does not fall into the "fundamental miscarriage of justice" exception. That narrow exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991). Although Petitioner concedes that he engaged in acts resulting in the victim's death, he argues that he is "innocent" of first degree murder since he lacked the requisite criminal intent. Petitioner maintains he could not form the requisite intent because at the time of the

shooting, he was in a state of voluntary intoxication. However, the question of Petitioner's ability to formulate the necessary intent was squarely before the jury during Petitioner's trial. Based on the evidence presented, the jury returned a verdict of guilty on the charge of first degree murder. In this habeas corpus proceeding, Petitioner has failed to allege any new evidence of innocence. He only argues that the jury instructions unconstitutionally diluted the State's burden of proof and essentially discounted his argument that his intoxication eliminated the required specific intent. "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 861 (1995). The Court agrees with the Magistrate Judge's conclusion that even if the alleged errors in the instructions were of a constitutional magnitude, Petitioner has failed to persuade this Court that no reasonable juror could have found him guilty beyond a reasonable doubt. Therefore, Petitioner has failed to demonstrate that a fundamental miscarriage of justice will result if his claims are not considered.

Because Petitioner has failed to demonstrate either "cause and prejudice" or a "fundamental miscarriage of justice," his claims are procedurally barred and this Court is precluded from considering his claims on the merits. Coleman v. Thompson, 510 U.S. 722, 724 (1991).

Finally, the Court finds Petitioner is not entitled to an evidentiary hearing on his claims. Pursuant to the habeas corpus statute, as amended by the AEDPA, this Court shall not hold an evidentiary hearing on claims where, as in this case, Petitioner failed to develop the factual basis of the claims in State court unless Petitioner shows that:

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Because the conjunctive "and" ties subsections (e)(2)(A) and (e)(2)(B), Petitioner must satisfy both to be entitled to an evidentiary hearing in a federal habeas corpus proceeding. As he has not established, in fact, he has not even argued, either of the requirements specified in subsection (e)(2)(A), Petitioner has failed to demonstrate that he is entitled to an evidentiary hearing on his claims.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#6) is **adopted and affirmed.**

2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **dismissed with prejudice.**

SO ORDERED THIS 7 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES BOWLDS,

Plaintiff,

vs.

LAMBERT'S ENGINE & PARTS WAREHOUSE, INC.,

Defendant.

Case No. 97 CV-980 K
Honorable Magistrate Judge Eagan

DISMISSAL WITHOUT PREJUDICE

COMES NOW, Charles Bowlds, Plaintiff, by and through his undersigned attorneys, and dismisses in its entirety his Complaint against Defendant filed on October 28, 1997.

Respectfully Submitted,

Jeffrey L. Parker, OBA #14974
J. Brian Rayl, OBA #17124
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Attorneys for Plaintiff
6506 South Lewis, Suite 220
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(918) 748-8118 telephone
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CERTIFICATE OF SERVICE

I, J. Brian Rayl, certify that a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed by first class mail, postage fully prepaid thereon, this 10th day of AUGUST, 1998, to:

Robert M. Butler, Esq.
Attorney at Law
1714 South Boston Avenue
Tulsa, Oklahoma 74119

J. Brian Rayl

c:bowlds.dis\JBR\srr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD WALLACE,)
)
Petitioner,)
)
vs.) Case No. 96-C-507-K (J)
)
RITA MAXWELL,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 7 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD WALLACE,)
)
Petitioner,)
)
vs.) Case No. 96-CV-507-K (J)
)
RITA MAXWELL,)
)
Respondent.)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #14) entered on July 8, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On July 20, 1998, Petitioner filed his objection to the Report (#15).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

After a non-jury trial, Petitioner was convicted of Robbery With a Firearm After Former Conviction of Three Felonies in Tulsa County District Court, Case No. CRF-84-2912. He was sentenced to fifty (50) years imprisonment. Petitioner did not file a timely direct appeal. However, he did file an application for post-conviction relief requesting an appeal out of time. His application was granted and Petitioner filed a direct appeal on February 18, 1986. The Oklahoma Court of

Criminal Appeals affirmed his conviction and sentence on December 9, 1987. See Wallace v. State, 747 P.2d 324 (Okla. Crim. App. 1987). Thereafter, Petitioner filed a second application for post-conviction relief in the trial court, claiming that his sentence had been improperly enhanced because one of his three prior convictions was a misdemeanor. On February 2, 1995, the state district court denied post-conviction relief. Petitioner appealed to the Oklahoma Court of Criminal Appeals, filing his petition-in-error on March 6, 1995. On April 21, 1995, that court dismissed the appeal because Petitioner had failed to appeal within the time period required by statute.

Petitioner filed the instant habeas corpus action on June 12, 1996. He presents two claims: (1) state trial court's imposition of a procedural bar was erroneous, and (2) improper enhancement of his sentence based on an "erroneous" prior conviction. Because the Oklahoma Court of Criminal Appeals refused to consider Petitioner's claims on post-conviction appeal because the petition-in-error was not timely filed, Respondent argues that Petitioner's claims are procedurally barred from federal habeas corpus review. Respondent also notes that even if Petitioner's claim of improper enhancement were considered on the merits, it would fail because Petitioner's sentence was not improperly enhanced. As "cause" for his procedural default, Petitioner claims that three significant cases, Maleng v. Cook, 490 U.S. 488 (1989); Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990); and Collins v. Hesse, 957 F.2d 746 (10th Cir. 1992), had not been decided at the time of his direct appeal preventing him from raising the issue of improper enhancement earlier. Petitioner also argues he is "innocent" of the enhanced sentence, thereby bringing this case within the fundamental miscarriage of justice exception to the procedural default doctrine.

In his Report, the Magistrate Judge found that Petitioner had met the exhaustion requirements of 28 U.S.C. § 2254 and concluded that Petitioner defaulted his claims in state court by failing to

perfect an appeal from the trial court's denial of the second application for post-conviction relief. According to the Magistrate Judge, Petitioner fails to demonstrate "cause and prejudice" or that his claims fall within the narrow "fundamental miscarriage of justice" exception and as a result, the petition for writ of habeas corpus should be denied as procedurally barred.

Petitioner objects to the Magistrate Judge's conclusions, alleging he should not be barred based on his failure to bring his claim in his first application for post-conviction relief because he has demonstrated cause for any procedural default since he did not know of the allegedly improper enhancement until "years later."

DISCUSSION

As discussed by the Magistrate Judge in his Report, the doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court agrees with the Magistrate Judge's

conclusion that Petitioner's claims are barred by the procedural default doctrine. Here, the Oklahoma Court of Criminal Appeals refused to consider Petitioner's instant claim not because he had failed to raise it in his first application for post-conviction relief, but rather because the court lacked jurisdiction based on Petitioner's failure to comply with Rule 5.2(C)(1), *Rules of the Court of Criminal Appeals*, requiring a petition in error to be filed within 30 days of the date of the final order of the state district court. However, Petitioner does not allege that he failed to file a timely post-conviction appeal "through no fault of his own." Therefore, if he were to return to state court to request an appeal out of time, the Oklahoma Court of Criminal Appeals would undoubtedly impose a procedural bar on this claim. See Duvall v. State, 869 P.2d 332, 333-34 (Okla. Crim. App. 1994); Shown v. Boone, 1995 WL 330752 (10th Cir. June 5, 1995) (where petitioner does not assert that he failed to appeal through no fault of his own, the Oklahoma Court of Criminal Appeals will impose a procedural bar on subsequent applications for post-conviction relief raising unexhausted claims). Thus, the state court's procedural bar as applied to Petitioner's claims would be an "independent" state ground because it would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not but could have been raised in a prior post-conviction application. See Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986).

Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

As stated above, Petitioner offers no explanation for his failure to file a timely appeal from the trial court's denial of his second application for post-conviction relief. Instead, he argues that he did not raise the error in his first application for post-conviction relief because he did not know that his sentence had been improperly enhanced "until years later," after he had already filed for post-conviction relief. Even if that default gave rise to the procedural bar at issue in this case, it is well-established that a Petitioner's ignorance of either law or fact is insufficient as a matter of law to constitute cause so as to override a procedural bar. See Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995); Andrews v. Deland, 943 F.2d 1162, 1192 (10th Cir. 1991). Therefore, Petitioner has failed to demonstrate cause sufficient to overcome his procedural default of this claim.

The Court also agrees with the Magistrate Judge's conclusion that Petitioner does not fall into the "fundamental miscarriage of justice" exception. That narrow exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted, McCleskey v. Zant, 499 U.S. 467, 494 (1991), and is intended for those rare situations "where the State has convicted the wrong person of the crime . . . [Or where] it is evident that the law has made a mistake." Sawyer v. Whitley, 505 U.S. 333 (1992). Petitioner argues in this case that he is "innocent" of the sentence he received because it was based on a prior misdemeanor conviction.

Thus, he argues legal innocence as opposed to factual innocence. Legal innocence is insufficient to satisfy the "fundamental miscarriage of justice" exception. Selsor v. Kaiser, 22 F.3d 1029, 1035 (10th Cir. 1994) (citing Sawyer, 505 U.S. 333). Therefore, the Court agrees with the Magistrate Judge's conclusion that Petitioner has failed to demonstrate that a fundamental miscarriage of justice will result if his claims are not considered.

Because Petitioner has failed to demonstrate either "cause and prejudice" or a "fundamental miscarriage of justice," his claims are procedurally barred and this Court is precluded from considering his claims on the merits. Coleman v. Thompson, 510 U.S. 722, 724 (1991).

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#14) is **adopted and affirmed.**

2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 7 day of August, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARLENE TATE; on behalf of
JOHN W. TATE, a minor child,
SSN: 445-94-3108,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

Case No. 96-CV-0950-EA

ENTERED ON DOCKET
DATE AUG 11 1998

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 10th day of August 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARLENE TATE, on behalf of JOHN W. TATE, a minor child, SSN: 445-94-3108,	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0950-EA**
KENNETH S. APFEL, Commissioner of Social Security,[1]	)	
Defendant.	)	

ORDER[2]

Claimant, John W. Tate, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3] Claimant asserts that the Commissioner erred because he failed to: develop the record; understand the medical evidence; follow the treating physician rule; properly complete the individual functional assessment form; and properly apply the Listing of Impairments. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision for further proceedings consistent with this Order.

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3 On November 29, 1993, claimant protectively applied for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (February 9, 1994), and on reconsideration (May 12, 1994). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held April 11, 1995, in Tulsa, Oklahoma. By decision dated June 14, 1995, the ALJ found that claimant was not disabled on or after November 29, 1993. On August 19, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

I. SOCIAL SECURITY LAW AND STANDARD OF REVIEW

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process.[4] See 42 U.S.C. § 1382c(a)(3)(A) (1994); 20 C.F.R. § 416.924(b) (1994).

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C)(i) (Supp. 1998). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Brown el rel. Wallace v. Callahan, 120 F.3d 1133, 1135

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[4] Evaluation of the disability of a child followed a four-step process. First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he is, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then determined whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then determined whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listing"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner was required to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

(10th Cir. 1997) (applying new standards to a children's disability appeal). Consequently, this new Act applies to the claimant's case.

The regulations which implement the Act provide:

> (d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.* An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> > (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
> >
> > (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.
> >
> > . . .

20 C.F.R. § 416.924(d). Consequently, based on the applicable statutes and regulations, claimant is disabled only if claimant can establish that he meets a Listing.[5/] See also Brown, 120 F.3d at 1135 ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

II. THE ALJ'S DECISION

The ALJ denied benefits at Step Four. The ALJ mentioned Step Three, finding that "[t]he claimant's impairment(s) neither meet nor equal the criteria of any impairment in the Listing of Impairments of Appendix 1, Subpart P, Regulations No. 4 (20 CFR Section 404)." (R. 19)

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5 At Step Three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1. An individual who meets or equals a Listing is presumed disabled.

III. REVIEW

When the ALJ held a hearing on this case and subsequently wrote his opinion, the applicable law was different from the law that currently applies. The problem created in this case is a result of the intervening change in the law. Due to the new statute, children are considered disabled only if they meet or equal a "Listing." However, because the applicable law at the time of his decision was different, the ALJ did not discuss the Listings, in any detail, in his Order.

At Step Three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A claimant has the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Further, in his decision, the ALJ is "required to discuss the evidence and explain why he found that [claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996).

As noted above, in this case, the ALJ merely stated that the claimant did not meet a Listing. This type of procedure is exactly what the Tenth Circuit criticized in Clifton. In Clifton, the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at Step Three, or even identify the relevant Listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his Step Three conclusion, and did not identify any potentially applicable Listings. In Clifton, the Tenth Circuit held that this type of a bare conclusion was beyond any meaningful judicial review. Id.

The Tenth Circuit quoted the statutory requirement:

> [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. 405(b)(1).

. . .

> This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether [his] factual findings are supported by substantial evidence and whether [he] applied the correct legal standards.
>
> . . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

79 F.3d at 1009-10 (citations and internal quotations omitted).

The Court believes that the change in the applicable law during the time between the decision of the ALJ and the decision of this Court is responsible for the situation presented in this case.

However, because no specific findings were made by the ALJ at Step Three, this Court is unable to review the Step Three decision and determine whether or not it was supported by substantial evidence.

The Court wishes to make clear that it is in no way expressing an opinion as to whether claimant actually meets or equals a Listing. This Court lacks the authority to make such findings. Rather, this Court is limited to reviewing the findings made by the ALJ and the Commissioner and determining if those findings are supported by substantial evidence. Consequently, the Court is remanding this case so that the ALJ can adequately discuss his conclusions in connection with any applicable Listings. Only then can this Court review the ALJ's decision in connection with the Listing(s).

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

DATED this 10th day of August, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE